SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 17

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

LELAND POWERS, EXECUTOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Original	Print
Proceedings in U.S.C.C.A., First Circuit	1	1
Caption [omitted in printing]	1	1
Proceedings before United States Board of Tax Appeals	1	1
Docket entries no. 47836	1	1
Same, no. 51029	3	2
Same, no. 61846	4	2
Petition no. 47836	5	3
Exhibit A—Certificate of appointment of executor	7	5
Exhibit B—Notice of appointment to Commissioner	8	5
Exhibit C—Notice of deficiency	8	5
Answer no. 47836	11	8
Petition no. 51029	12	8
Exhibit A—Notice of deficiency	13	9
Answer no. 51029	16	11
Petition no. 61846	16	12
Exhibit A—Notice of deficiency	18	13
Answer no. 61846	21	15
Amended answer no. 61846	22	16
Findings of fact and opinion, Smith, M	23	17
Decision—No. 47836	40	29
Same no. 51029	41	30
Same, no. 61846	41	30
Petition for review, no. 47836	41	30

	Original	Print
Proceedings before United States Board of Tax Appeals—Con.		
Affidavit of service	44	32
Petition for review, no. 51029	44	33
Affidavit of service; memorandum as to	46	33
Petition for review, no. 61846	46	34
Affidavit of service; memorandum as to	47	34
Statement of the evidence, no. 47836	48	35
Praecipe for transcript of record	50	36
Certificate of clerk [omitted in printing]	51	37
Docket entries, no. 48007	52	37
Same, no. 50575	53	38
Petition no. 48007	54	38
Exhibit A—Notice of deficiency	57	41
Exhibit B—Chapter 159, special acts, 1918; recital as to	61	44
Answer no. 48007	62	44
Amended answer no. 48007	62	44
Petition no. 50575	63	45
Exhibit A—Notice of deficiency	66	47
Exhibit B—Chapter 159, special acts, 1918; recital as to	68	49
Answer no. 50575	69	49
Findings of facts and opinion; memorandum as to	69	50
Decision no. 48007	70	50
Same, no. 50575	70	50
Petition for review no. 48007	70	51
Affidavit of service	72	51
Petition for review no. 50575; memorandum as to	72	52
Affidavit of service; memorandum as to	73	52
Statement of evidence, 48007	73	53
Same, no. 50575	76	55
Praecipe for record; memorandum as to	78	56
Certificate of clerk [omitted in printing]	78	56
Memorandum re orders enlarging time	79	57
Minute entries	81	57
Opinion, Morton, J	83	57
Final decree	87	60
Recital as to issuance of mandate	88	61
Clerk's certificate [omitted in printing]	88	61
Order allowing certiorari	89	61

1 [Caption omitted.]

Before United States Board of Tax Appeals

DOCKET No. 47836

LELAND POWERS, EXECUTOR OF THE ESTATE OF SAMUEL L. POWERS, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:

For taxpayer: Robert H. Montgomery, Esq., Melville F. Weston, Esq., Stanley R. Miller, Esq.

For Commissioner: Harold Allen, Esq.

Docket entries

1930

Mar. 13—Petition received and filed. Taxpayer notified (fee paid).
" 14—Copy of petition served on general counsel.
Apr. 24—Answer filed by general counsel.
May 1—Copy of answer served on taxpayer. General calendar.

2 1931

Feb. 11—Motion to consolidate with dockets 48007 and 51029 filed by taxpayer. 2/14/31 granted.

1932

Feb. 11—Hearing set April 27, 1932.
Mar. 31—Motion to consolidate with dockets 51029, 48007, and 50575 filed by taxpayer. 4/5/32 granted.
Apr. 27—Hearing had before Mr. Smith on merits. Submitted to Mr. Smith. Stipulation on facts filed. Briefs due in 30 days.
May 21—Brief filed by taxpayer.
" 27—Brief filed by general counsel.
Jun. 1—Transcript of hearing of April 27, 1932, filed.
Aug. 12—Order setting proceeding for hearing Sept. 14, 1932, for correction of the pleadings unless a stipulation is filed by the parties to the effect that the pleadings shall conform to the proof, entered.
Oct. 27—Findings of fact and opinion rendered, Charles P. Smith, div. 5. Judgment will be entered for the respondent.
" 27—Decision entered, Charles P. Smith, div. 5.
Dec. 22—Petition for review by U.S. Circuit Court of Appeals (1) with assignments of error filed by taxpayer.
" 22—Agreed statement of evidence lodged.

1933
Jan. 19—Praecipe filed—proof of service thereon.
" 20—Affidavit of service of petition for review filed.
" 20—Agreed statement of evidence approved and ordered filed.
Feb. 19—Order enlarging time to March 31, 1933, for transmission of record entered.

3 Before United States Board of Tax Appeals

Docket No. 51029

WINTHROP COFFIN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:
For taxpayer: Robert H. Montgomery, Esq., M. F. Weston, Esq., S. R. Miller, Esq.
For Commissioner: Harold Allen, Esq.

Docket entries

1930
Nov. 28—Petition received and filed. Taxpayer notified. (Fee paid.)
" 28—Copy of petition served on general counsel.
1931
Jan. 6—Answer filed by general counsel.
" 17—Copy of answer served on taxpayer. General Calendar.
Feb. 11—Motion to consolidate with dockets 48007, 47836, and 50575 filed by taxpayer. 2/14/31 granted.
1932
Feb. 11—Hearing set April 27, 1932.
Mar. 31—Motion to consolidate with 61846, 47836, 51029, 48007, and 50575 filed by taxpayer.
Apr. 5—Motion granted.
(Memorandum. The remaining docket entries April 27, 1932, to February 19, 1933, being the same as docket entries in no. 47836 printed at page 1, are here omitted. A. I. Charron, clerk.)

4 Before United States Board of Tax Appeals

Docket No. 61846

HENRY I. HARRIMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:
For taxpayer: Robert H. Montgomery, Esq., Melville F. Weston, Esq., Stanley R. Miller, Esq.
For Commissioner: Harold Allen, Esq.

Docket entries

1932

Feb. 11—Petition received and filed. Taxpayer notified. (Fee paid.)
" 12—Copy of petition served on general counsel.
Mar. 16—Answer filed by general counsel.
" 22—Copy of answer served on taxpayer. General Calendar.
" 31—Motion to consolidate with dockets 47836, 51029, 48007, and 50575 filed by taxpayer.
Apr. 4—Motion to file an amended answer filed by general counsel. Amended answer lodged.
" 5—Motion to consolidate granted.
" 7—Hearing set April 27, 1932.

(Memorandum. The remaining docket entries April 27, 1932 to February 19, 1933, being the same as docket entries in no. 47836 printed at page 1, are here omitted. A. I. Charron, clerk.)

5 Before U.S. Board of Tax Appeals

Docket No. 47836

[Title omitted.]

Petition

Filed March 13, 1930

The above-named petitioner hereby petitions for redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the notice of deficiency (IT:AR:B–6 JMF–60D) dated February 21, 1930, addressed to Samuel L. Powers, 96 Arlington Street, Newton, Massachusetts, and as the basis of his proceeding alleges as follows:

1. The petitioner is the duly appointed and qualified executor of the Estate of Samuel L. Powers, late of Newton, Middlesex County, Massachusetts, and is a resident of said Newton (124 Chestnut Hill Road), a certificate of his appointment duly certified by the register of probate for said county is attached to the original of this petition, marked "Exhibit A" and a copy of said certificate is attached to each of the other copies hereof. Said Samuel L. Powers died November 30, 1929, and your petitioner was appointed executor as aforesaid on January 3, 1930. On or about March 10, 1930, your petitioner duly notified the Commissioner of Internal Revenue of his appointment as such. A copy of said notice is hereto attached marked "Exhibit B."

2. The notice of deficiency (copy of which is attached marked "Exhibit C") was mailed addressed to said Samuel L. Powers on February 21, 1930.

3. The taxes in controversy are income taxes for the calendar year 1927, and the amount in controversy is $553.44.

4. The determination of tax contained in said deficiency letter is based upon the following error:

The Commissioner has held that the taxpayer's salary as one of the trustees of the Boston Elevated Railway Company for the year 1927 is taxable.

5. The facts upon which the taxpayer relies as a basis of his appeal are as follows:

(a) On or about October 25, 1918, said Samuel L. Powers was appointed by the Governor of the Commonwealth of Massa-
6 chusetts, with the advice and consent of the Governor's council, a member of the board of trustees of the Boston Elevated Railway Company under the provisions of chapter 159 of the special acts of the General Court of said Commonwealth for 1928; on or about October 28, 1918, he took and subscribed to the oaths prescribed by the constitution and laws of said Commonwealth to qualify him to execute the trust imposed in him; said appointment was for a period of ten years from July 1, 1918; during the year 1927 he by virtue of said appointment acted as such trustee and received as compensation therefor the sum of $5,000, all pursuant to the terms of said special act.

(b) Pursuant to said special act the trustees took and had possession of the property of the Boston Elevated Railway Company in behalf of the Commonwealth, appointed and removed officers of the corporation, regulated and fixed fares, including the issuing, granting and withdrawal of transfers, determined the character and the extent of the services and facilities to be furnished, issued stock, bonds and other evidences of indebtedness, determined the amount of any deficiency resulting from the operation of the railway and notified the treasurer and receiver general of the Commonwealth thereof, whereupon it became the duty of the Commonwealth to pay over to the company the amount so ascertained, and apportioned among the cities and towns in which the railway was operated the taxes to be assessed upon them as an addition to the State tax wherewith to pay such deficiency, all as more fully appears in said special act to which reference is hereby made and a copy of which will be adduced in evidence. The jurisdiction of the Public Service Commission of the Commonwealth with respect to the fares, stock and bond issues, and facilities and services of the Boston Elevated Railway was terminated and transferred to said board of trustees.

6. Wherefore the petitioner prays for relief from the entire deficiency asserted by the respondent and that the Board may hear and redetermine said deficiency.

ROBERT H. MONTGOMERY,
Counsel for Petitioner,
30 Federal Street, Boston, Massachusetts.

7 [*Duly sworn to by Leland Powers, jurat omitted in printing.*]

COMMONWEALTH OF MASSACHUSETTS

Exhibit A to petition

Middlesex, ss:

Probate Court.

I, Loring P. Jordan, Register of the Probate Court for said County of Middlesex, hereby certify, that at a Probate Court holden in and for the said county, on the third day of January in the year of our Lord one thousand nine hundred and thirty the last will and testament of Samuel L. Powers, late of Newton in said county, deceased, testate, was duly proved and allowed in accordance with the laws of said Commonwealth, and letters testamentary thereon issued to Leland Powers of Newton in the county of Middlesex, the executor therein named who gave bond to the acceptance of the judge of said court for the due performance of said trust according to law.

I also certify, that it appears by the records and files of said court, that said letters are now in full force.

In witness whereof, I have hereunto set my hand and the seal of said court, this thirtieth day of January in the year of our Lord one thousand nine hundred and thirty.

[SEAL] LORING P. JORDAN, *Register.*

8 *Exhibit B to petition*

BOSTON, *March 10, 1930.*

COMMISSIONER INTERNAL REVENUE,
Washington, D.C.

DEAR SIR: Notice is hereby given that Mr. Samuel L. Powers, 96 Arlington Street, Newton, Massachusetts, died on November 30, 1929, and that the undersigned was duly appointed executor of his last will and testament on January 3, 1930. A certificate of his appointment is enclosed.

This notice is given pursuant to section 312 of the Revenue Act of 1928.

Very truly yours,

LELAND POWERS.

Address: 30 Federal Street, Boston, Mass.

Exhibit C to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, February 21, 1930.

Address reply to Commissioner of Internal Revenue and refer to IT:AR:B-6 JMF-60D.

Mr. SAMUEL L. POWERS,
96 Arlington Street, Newton, Massachusetts.

SIR: In accordance with section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the

year 1927 discloses a deficiency of $553.44, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However(if you do not desire to petition, you are requested to execute the inclosed form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P–7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assesssment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBT. H. LUCAS, *Commissioner.*
By *Deputy Commissioner.*

Inclosures: Statement. Form 866. Form 882.

STATEMENT

IT:AR:B–6. JMF–60D. FEB. 21, 1930.

In re: Mr. Samuel L. Powers, 96 Arlington Street, Newton, Massachusetts

Tax liability

Year	Corrected tax liability	Tax previously assessed	Deficiency
1927	$1,228.37	$674.93	$553.44

Information on file in this office discloses that you received a salary of $5,000.00 as one of five trustees for the State of Massachusetts of the Boston Elevated Railway Company, which amount was not reported in your return. Your protest executed October 25, 1929 against the deficiency proposed in office letter dated October 5, 1929 has been given consideration in the review of your return.

Net income reported	$20,671.82
Add: Salary from Boston Elevated Railway Company	5,000.00
Net income adjusted	25,671.82

The amount of $5,000.00 has been added to income reported for the reason it is held that the salary was not derived from the exercise of any essential governmental function as provided by section 213 (b) (7) of the Revenue Act of 1926, and article 88, Regulations

69. You are informed that to be entitled to the exemption provided by the Revenue Act of 1926 the services must have been rendered in connection with the exercise of an essential governmental function of the State or political subdivision. In this connection your attention is called to General Counsel Memorandum No. 3142, published in Cumulative Bulletin VII–1 at page 78.

Reference is made to the statement in issue 1 in the protest with respect to the years 1920 to 1923, inclusive, to the effect that in the Decision 12, United States Board of Tax Appeals 702, it was held that the trustees of the Boston Elevated Railway Company were officers of the Commonwealth of Massachusetts. It appears this decision was based upon the fact that the tax for the years mentioned was assessed under the provisions of section 1211 of the Revenue Act of 1926, which section required only that the services be rendered by an officer or employee of a State or political subdivision thereof. The question as to whether the services were rendered in the exercise of an essential governmental function, was not considered in arriving at the decision referred to.

With respect to issue 2 wherein it is contended that the trustees performed an essential governmental function, you are informed that the question has been given careful consideration, but in view of the circumstances surrounding the operation of the railway company, it is held by this office that services performed do not fall within the classification "Essential Governmental Function" as specified in article 88, Regulations 69. Your attention is called to Solicitor's Opinion 152, published in Cumulative Bulletin 2–2, page 93. The protest has, therefore, been denied.

Computation of tax

Net income adjusted		$25,671.82
Less: Dividends	$220.00	
Personal exemption	3,500.00	3,720.00
Balance subject to normal tax		21,951.82
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax on 5% on $13,951.82		697.59
11 Surtax on $25,671.82		557.06
Total		1,434.62
Less: Earned income credit		206.25
Tax liability		1,228.37
Tax previously assessed		674.93
Deficiency		553.44

Payment should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him.

You are advised that a copy of this communication has been transmitted to your representative Mr. Robert H. Montgomery, 30 Federal Street, Boston, Massachusetts, who has on file in this office a duly recorded power of attorney.

Before United States Board of Tax Appeals

Docket No. 47836

[Title omitted.]

Answer

Filed April 24, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for answer to the petition filed by above-named taxpayer, admits and denies as follows:

1. Admits the averments contained in paragraph 1.
2. Admits the averments contained in paragraph 2.
3. Admits the averments contained in paragraph 3.
4. Denies the error alleged in paragraph 4.
5. Admits the averments contained in paragraph 5 (a) and (b).

Wherefore, it is prayed that the taxpayer's petition be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:

HAROLD ALLEN,
Special Attorney, Bureau of Internal Revenue.

12 Before United States Board of Tax Appeals

Docket No. 51029

[Title omitted.]

Petition

Filed November 28, 1930

The above-named petitioner hereby petitions for redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the notice of deficiency IT: AR B–1 MCB–60D) dated November 17, 1930, and as the basis of his proceeding alleges as follows:

1. The petitioner is a resident of Brookline, 45 Warren Street, Norfolk County, Massachusetts.

2. The notice of deficiency, copy of which is attached marked "Exhibit A", was mailed on November 17, 1930.

3. The taxes in controversy are income taxes for the calendar year 1927 and the amount in controversy is $934.29.

4. The determination of tax assessed in said deficiency letter is based upon the following error: "The Commissioner has held that the taxpayer's salary as one of the trustees of the Boston Elevated Railway Company for the year 1927 is taxable."

5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) Prior to the year 1927 the taxpayer was appointed by the Governor of the Commonwealth of Massachusetts, with the advice and consent of the Governor's council, a member of the board of trustees of the Boston Elevated Railway Company under the provisions of chapter 159 of the Special Acts of the General Court of said Commonwealth for 1918; prior to said year 1927 he took and subscribed to the oath prescribed by the Constitution and laws of said Commonwealth qualifying him to execute the trust imposed in him; said appointment was for a period expiring ten years from
13 July 1, 1918; during the year 1927 he by virtue of said appointment acted as such trustee and received as compensation therefor the sum of $5,000, all pursuant to the terms of said special act.

(Memorandum. The remaining paragraphs 5 (b) and 6, being the same as those of the petition in no. 47836, already printed at pages 5 and 6, are here omitted. A. I. Charron, clerk.)

ROBERT H. MONTGOMERY,
Counsel for Taxpayer,
30 Federal Street, Boston, Mass.

[*Duly sworn to by Winthrop Coffin, jurat omitted in printing.*]

Exhibit A to petition

Mailed Nov. 17, 1930.

IT:AR:B–1 MCB–60D

Mr. WINTHROP COFFIN,
(c/o Coffin and Burr, Incorporated),
60 State Street, Boston, Massachusetts.

SIR: You are advised that the determination of your tax liability for the year(s) 1927 discloses a deficiency of $934.29, as shown in the statement attached.

In accordance with section 274 of the Revenue Act of 1926, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested
14 to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P–7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing

the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By W. T. SHERWOOD,
Acting Deputy Commissioner.

Enclosures: Statement. Form 882. Form 870.

STATEMENT

IT:AR:B–1 MCB–60D

In re: Mr. Winthrop Coffin, c/o Coffin and Burr, Incorporated, 60 State Street, Moston, Massachusetts

Tax liability

Year	Corrected tax liability	Tax previously assessed	Deficiency
1927	$10,148.17	$9,213.88	$934.29

Further reference is made to the review of your 1927 income tax return in connection with the report of the internal revenue agent in charge, Boston, Massachusetts, covering an examination of your income tax liability for the year in question.

The issue involved is the taxability of money received for services rendered as trustee of the Boston Elevated Railway Company.

You are advised that this office holds that the salary received by you as trustee of the Boston Elevated Railway Company was not for services rendered in the exercise of an essential governmental function and is subject to Federal income tax.

The report of the internal revenue agent in charge, Boston, Massachusetts, covering an examination of your 1927 income
15 tax liability, a copy of which was furnished you, has been reviewed and approved by this office, with the following exception:

The amount previously assessed is $9,213.88 instead of $9,212.17, as shown by the revenue agent's report.

A synopsis of your return as corrected, follows:

Net income reported on the return	$86,105.90
Plus: 1. Salary	5,009.00
Adjusted net income	91,105.94

Less:		
Dividends	$88,837.00	
Personal exemption	4,700.00	
		$91,537.00
Balance subject to normal tax		None
Surtax on $91,105.94		9,970.13
Tax at 12½% on capital net gain of $2,014.78		251.84
Total tax		10,221.97
Less:		
Credit of 25% for earned net income	14.00	
Tax paid at source	59.80	
		73.80
Total tax assessable		10,148.17
Tax previously assessed		9,213.88
Deficiency		934.29

EXPLANATION OF CHANGES

Salary of $5,000.00 received as trustee of the Boston Elevated Railway Company has been added to your taxable income for reasons as explained above.

A copy of this communication has been furnished your attorney, Mr. Robert H. Montgomery, who has on file in this office, a duly recorded power of attorney.

Payment should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him.

16 Before United States Board of Tax Appeals

Docket No. 51029

[Title omitted.]

Answer

Filed January 6, 1931

The Commissioner of Internal Revenue, by his attorney C. M. Charest, general counsel, Bureau of Internal Revenue, for answer to the petition filed by above-named taxpayer, admits and denies as follows:

1, 2, 3. Admits the averments contained in paragraphs 1, 2, and 3.

4. Denies error in the action recited in paragraph 4.

5. Admits the averments contained in paragraph 5.

Wherefore, it is prayed that the taxpayer's petition be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:

HAROLD ALLEN,
Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Docket No. 61846

[Title omitted.]

Petition

Filed February 11, 1932

The above-named petitioner hereby petitions for redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the notice of deficiency (IT:AR:B–1:ARM–60D) dated January 14, 1932 and as the basis of his proceeding alleges as follows:

1. The petitioner is a resident of Newton, in the county of Middlesex, and Commonwealth of Massachusetts, residing at 825 Centre Street in said Newton.

2. The notice of deficiency, copy of which it attached marked "Exhibit A" was mailed on January 14, 1932.

17 3. The taxes in controversy are income taxes for the calendar year 1929 and the amount in controversy is $955.66.

4. The determination of tax proposed to be assessed in said deficiency letter is based upon the following error: The sustaining by the Commissioner of the action of the examining officer in including the salary of $5,000 received by the taxpayer in the year 1929 as one of the trustees of the Boston Elevated Railway Company as part of the taxpayer's taxable income for the year 1929.

5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) Prior to the year 1929 the taxpayer was appointed by the Governor of the Commonwealth of Massachusetts, with the advice and consent of the Governor's counsel, a member of the Board of Trustees of the Boston Elevated Railway Company under the provisions of chapter 159 of the Special Acts of the General Court of said Commonwealth of the year 1918; prior to said year 1929 he took and subscribed to the oath prescribed by the constitution and laws of said Commonwealth qualifying him to execute the trust so imposed in him; said appointment was for a term which included in its entirety the said year 1929, and during the said year 1929 he by virtue of said appointment acted as such trustee and received as compensation therefor the sum of $5,000, all pursuant to the terms of said special act.

[MEMORANDUM. The remaining paragraphs 5 (b) and 6, being the same as those of the petition in no. 47836, already printed at pages 5 and 6, are here omitted. A. I. Charron, clerk.]

ROBERT H. MONTGOMERY,
MELVILLE F. WESTON,
Counsel for Taxpayer,
30 Federal Street, Boston, Mass.

[*Duly sworn to by Henry I. Harriman, jurat omitted in printing.*]

18 Amendment to Petition. Filed August 20, 1932

Exhibit "A" to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Jan. 14, 1932.

Address reply to Commissioner of Internal Revenue and refer to Mr. HENRY I. HARRIMAN,
825 Centre Street, Newton, Massachusetts.

SIR: You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $955.66, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest wil accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. WILMER,
Deputy Commissioner.

Enclosures: Statement. Form 882. Form 870.

IT:AR:B-1 ARM-60D

19 STATEMENT

In re: Mr. Henry I. Harriman, 825 Centre Street, Newton, Massachusetts

Tax liability

Years	Tax liability	Tax assessed	Deficiency
1929	$15,072.09	$14,116.43	$955.66

The adjustent recommended in the report of the internal revenue agent in charge at Boston, Massachusetts, a copy of which was furnished you, has been approved after considering your protest.

You contend that salary of $5,000.00 received for services rendered as trustee of the Boston Elevated Railway Company is exempt from tax and that your return should be adjusted in accordance with the decision rendered in the case of Winthrop Coffin et al., 12 United States Board of Tax Appeals, page 702.

You are advised that the decision rendered in the above case applied to the taxable years 1921 and 1923, inclusive, whereas, article 643 of Regulations 74 reads in part as follows:

"Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States, is not taxable. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (a) the person receives such compensation as an officer or employee of a State or political subdivision, and (b) the services are rendered in connection with the exercise of an essential governmental function. . . .

"An officer is a person who occupies a position in the service of the State or political subdivision, the tenure of which is continuous and not temporary and the duties of which are established by law or regulations and not by agreement. An employee is one whose duties consist in the rendition of prescribed services and not the accomplishment of specific objects, and whose services are continuous, not occasional or temporary. . . ."

In Mimeograph 3838 published in Cumulative Bulletin IX–2, page 137, it is stated,

"Street railways.—While the operation of a street railway may be a public necessity, it is not an instrumentality of the city in the discharge of its ordinary functions as a government. If it is not an instrumentality of government, it is not, in accordance with the decisions quoted above, removed from the sphere of Federal taxation, and the compensation of the officers and employees thereof must be included in gross income. (See Sol. Op. 152, C.B. Dec. 1923, p. 93; S.M. 2232 C.B. Dec. 1924, p. 83; I.T. 2405, C.B. June 1928, p. 72; City of Seattle et al. *v.* Poe, Collector, et al., 4 Fed. (2d) 276 (5 Am. Fed. Tax. Rep. 5329), T.D. 3701, C.B. June 1925, p. 290.)"

In view of the above, the action of the examining officer in including the salary of $5,000.00 received as trustee of the Boston Elevated Railway Company as income taxable under the Revenue Act of 1928 is sustained.

Net income reported on return	$112,352.16
Add: Salary	5,000.00
Net income adjusted	117,352.16

COMPUTATION OF TAX

Net income adjusted		$117,352.16
Less:		
Dividends	$111,676.75	
Personal exemption and credit for dependent	3,900.00	
		115,576.75
Income subject to normal tax		1,775.41
Normal tax at ½% on $1,775.41		8.88
21 Surtax on $117,352.16		$15,130.43
Total tax		15,139.31
Les: Earned income credit		67.22
Tax assessable		15,072.09
Tax previously assessed		14,116.43
Deficiency in tax		955.66

Since no reply has been received to office letter dated December 17, 1931, this letter of final determination is being issued.

Before United States Board of Tax Appeals

Docket No. 61846

[Title omitted.]

Answer

Filed March 16, 1932

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that the notice of deficiency was mailed January 14, 1932.

3. Admits the taxes in controversy are income taxes for the calendar year 1929, but denies that the amount in controversy is $955.66.

4. Denies that the respondent erred in the manner alleged in paragraph 4 of the petition.

5. (a) and (b). Admits that the petitioner received in the year 1929 the sum of $5,000 for services rendered as trustee of the Boston Elevated Railway Company, and denies the remaining allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

22 Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus any additional amount

which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
C. A. RAY,
Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Docket No. 61846

[Title omitted.]

Amended answer

Filed April 11, 1932

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for amended answer to the petition filed by above-named taxpayer, admits and denies as follows:

1, 2, and 3. Admits the averments contained in paragraphs 1, 2, and 3.

4. Denies error in the action stated in paragraph 4.

5. Admits the averments contained in paragraph 5.

Wherefore, it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

23 Of counsel:
HAROLD ALLEN,
Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

LELAND POWERS, EXECUTOR OF THE ESTATE OF SAMUEL L. POWERS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

STANLEY R. MILLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

WINTHROP COFFIN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

HENRY I. HARRIMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 47836, 48007, 50575, 51029, 61846

Compensation paid to the petitioners as trustees of the Boston Elevated Railway Company during the taxable years 1926 to 1929, inclusive, held, subject to Federal income tax.

Melville F. Weston, Esq., and Stanley R. Miller, Esq., for the petitioners.

Harold Allen, Esq., for the respondent.

Findings of fact and opinion

Promulgated October 27, 1932

These proceedings, duly consolidated for hearing, are for the redetermination of deficiencies in income tax for the years and in amounts as follows:

Docket No.	Petitioner	Year	Deficiency
47836	Leland Powers, executor of the estate of Samuel L. Powers	1927	$553.44
48007	Stanley R. Miller	1926	240.89
		1927	334.36
24 50575	Stanley R. Miller	1928	226.02
51029	Winthrop Coffin	1927	994.29
61846	Henry I. Harriman	1929	965.66

For convenience, Docket No. 47836 will be treated as though the decedent, whose income is in issue, were the petitioner. The petitioners allege that the respondent erred in including in their taxable

incomes the compensation each received as a trustee of the Boston Elevated Railway Company for the respective years. The proceedings were submitted upon the pleadings and stipulations.

Findings of fact

The petitioners are residents of the Commonwealth of Massachusetts.

Prior to the taxable years under consideration, the petitioners were appointed members of the board of trustees of the Boston Elevated Railway Company under the provisions of Chapter 159 of the Special Acts of 1918 of the Commonwealth of Massachusetts, "An act to provide for the public operation of the Boston Elevated Railway Company," which reads in part as follows:

"SECTION 1. The board of trustees of the Boston Elevated Railway Company is hereby created, to consist of five persons to be appointed by the governor, with the advice and consent of the council. The persons so appointed shall be sworn before entering upon the performance of their duties; shall own no stock or other securities of the Boston Elevated Railway Company or of any company owned, leased, or operated by it; shall serve for the term of ten years from the date when they assume the management of the company as hereinafter provided and until their successors are duly appointed and qualified; and *each shall receive from the company as compensation for his services five thousand dollars annually.* . . .

"*Said trustees shall not be considered public officers within the meaning of section twenty-five of chapter five hundred and fourteen of the acts of nineteen hundred and nine*, but shall be subject in all other respects to the provisions of said section to the same extent as are the directors of the Boston Elevated Railway Company, but said section shall not apply to recommendations by the governor to said trustees. . . .

"If the public management and operation of the railway system of the Boston Elevated Railway Company shall continue beyond the original period of ten years the governor shall, with the advice and consent of the council, at the expiration of each ten-year period during the continuance of public management and operation, appoint five successor trustees to serve for a period of ten years, and until their successors are appointed and qualified, but not exceeding the period of public management and operation. . . .

"SECTION 2. *Said board of trustees*, hereinafter called the trustees, *shall manage and operate the Boston Elevated Railway Company*, hereinafter called the company, and the properties owned, leased, or operated by it, for a period of ten years, commencing on the first day of the month next after their appointment and qualification, and subject to the provisions of this act, shall take and have possession of said properties in behalf of the Commonwealth during the period

of public operation, and, for the purposes of this act, shall, except as is otherwise provided in this act, have and may exercise all the rights and powers of said company and its directors, and, upon behalf of said company, shall receive and disburse its income and funds. . . . They shall have the right to regulate and fix fares, including the issue, granting, and withdrawal of transfers, and the imposition of charges therefor, and shall determine the character and extent of the service and facilities to be furnished, *and in these respects their authority shall be exclusive and shall not be subject to the approval, control, or direction of any other State board or commission.*

In the management and operation of the said company and of the properties owned, leased, or operated by it, as authorized by this act, the *trustees* and their agents, servants, and employees *shall be deemed to be acting as agents of the company and not of the Commonwealth*, and the company shall be liable for their acts and negligence in such management and operation to the same extent as if they were in the immediate employ of the company, but said trustees shall not be personally liable. . . . Nothing herein contained shall be held to affect the right of the Commonwealth or any subdivision thereof to tax the company or its stockholders in the same manner and to the same extent as if the company had continued to manage and operate its own property.

"SECTION 3. The trustees shall have authority to make contracts in the name and on behalf of, and to issue stocks, bonds, and other evidences of indebtedness of, the company. . . .

". . . The trustees shall cause to be paid all amounts which may from time to time become due from the company, and shall declare dividends at the appointed times upon the preferred and common stock of the company, and provide for the payment of the same. . . .

"SECTION 6. The trustees shall from time to time, in the manner hereinafter provided, fix such rates of fare as will reasonably insure sufficient income to meet the cost of the service, which shall include operating expenses, taxes, rentals, interest on all indebtedness, such allowance as they may deem necessary or advisable for depreciation of property and for obsolescence and losses in respect to property sold, destroyed, or abandoned, all other expenditures and charges which under the laws of the Commonwealth now or hereafter in effect may be properly chargeable against income or surplus, fixed dividends on all preferred stock of the company from time to time outstanding, and dividends on the common stock of the company from time to time outstanding at the rate of five per cent per annum on the par value thereof during the first two years, five and one-half per cent per annum on the par value thereof during
27 the next two years and six per cent per annum on the par value thereof during the balance of the period of public operation. . . .

"SECTION 11. If, as of the last day of June in the year nineteen hundred and nineteen, or the last day of any December or June thereafter, the amount remaining in the reserve fund shall be insufficient to meet the deficiency mentioned in section nine, it shall be the duty of the trustees to notify the treasurer and receiver general of the Commonwealth of the amount of such deficiency, less the amount, if any, in the reserve fund applicable thereto, and the Commonwealth shall thereupon pay over to the company the amount so ascertained. . . . If, as of the last day of any June or December thereafter during the period of public operation, the reserve fund shall exceed the amount originally established, the trustees shall apply the excess, so far as necessary, to reimbursing the Commonwealth for any amounts which it may have paid to the company under the provisions hereof, and the Commonwealth shall thereupon distribute the amount so received among the cities and towns in which the company operates, in proportion to the amounts which they have respectively been assessed as provided in section fourteen. . . .

"SECTION 12. Notwithstanding anything contained in this act, *the public management and operation of the railway system of the company* shall continue after the expiration of said ten-year period upon the terms and conditions herein specified until such time as the Commonwealth shall elect to discontinue such public management and operation. The Commonwealth shall have the right to terminate such public management and operation, either at the expiration of the said ten-year period or at any time thereafter, by appropriate legislation passed not less than two years before the date fixed for such termination.

"SECTION 13. It shall be the duty of the trustees to maintain the property of the company in good operating condition and to make such provision for depreciation, obsolescence, and rehabilita-
28 tion, that, upon the expiration of the period of public management and operation, the property shall be in good operating condition. If the period of public management and operation expires, control of the property shall then revert to the company, and if at that time the reserve fund shall be less than the amount originally established because the income during the period of public management and operation has been insufficient to pay the cost of the service, the Commonwealth shall forthwith pay over to the company an amount sufficient to restore it to its original amount, and if the amount in said reserve fund is then in excess of the amount originally established and any amount required to meet the cost of the service to the expiration of such period, such excess shall be paid into the treasury of the Commonwealth and distributed among the cities and towns in which the company operates in the same proportions as the assessments provided for by section fourteen.

"SECTION 14. In case the Commonwealth shall be called upon to pay to the trustees or the company any amount under the provisions

of sections eleven and thirteen, such amount with interest or other charges incurred in borrowing money for the purpose shall be assessed upon the cities and towns in which the company operates by an addition to the State tax next thereafter assessed in proportion to the number of persons in said cities and towns using the service of the company at the time of said payment, said proportion to be determined and reported to the treasurer and receiver general by the trustees from computations made in their discretion for the purpose.

"SECTION 15. Upon the termination of the period of public management and operation, the company shall manage and operate the property and may fix and collect such just and reasonable fares as will produce an income sufficient to pay the reasonable cost of the service as defined in section six, including dividends upon the common stock from time to time outstanding of six per cent per annum on the par value thereof but no more, and may establish
29 schedules of fares which shall automatically increase or decrease in the same manner as is authorized in the case of the trustees: provided, that the Commonwealth shall be under no liability to make any payments to the company by reason of any deficiencies in income accruing after the discontinuance of public operation. The company shall thereafter be subject to public regulation and supervision in such manner as may be determined by the general court, but such regulation and supervision shall not be exercised so as to reduce the income below the reasonable cost of the service as defined in this act." [Italics supplied.]

In 1919, the Commonwealth, pursuant to the terms of section 11 of chapter 159, paid over to the company $3,980,151.67, the amount of the deficiency resulting from the public operation of the railway; this sum was apportioned among the cities and towns served by the railway as an addition to the State tax. Subsequent operations of the railway up to and including 1929 did not result in an excess of income sufficient to fully reimburse the Commonwealth and/or the cities and towns for the amount paid to the company in 1919.

During the respective taxable years each petitioner was a member of the board of trustees of the Boston Elevated Railway Company and as such trustee received compensation from the Railway Company in the amount of $5,000 per year as provided in chapter 159 of the Special Acts of 1918.

The Commissioner has determined that the compensation thus received by each petitioner is subject to income tax in the respective taxable years.

Opinion

SMITH: In Winthrop Coffin, 12 B.T.A. 702, this Board held that compensation paid to trustees of the Boston Elevated Railway Company in the years 1920 to 1923, inclusive, was exempt from the Federal income tax. We there considered this issue solely from the standpoint of whether the taxpayers were officers of the Com-

30 monwealth of Massachusetts. After a full consideration of the legislation creating the board of trustees for the operation of the Boston Elevated Railway Company and pertinent court decisions relating thereto, we said:

"We are led to the inescapable conclusion that the petitioners are officers of the Commonwealth of Massachusetts. In view of section 1211 of the Revenue Act of 1926 which makes that the test of exemption, we do not deem it necessary to discuss the question as to whether the services performed by the trustees are essentially governmental or not. As we construe section 1211, that question need not be answered if the petitioners are receiving amounts 'as compensation for personal services as an officer or employee of any State.' We see no escape from holding that the salaries of the petitioners were so received and we, therefore, hold that such salaries are exempt from tax."

The respondent now contends that although the petitioners were officers of the Commonwealth of Massachusetts, the compensation they received as members of the board of trustees of the Boston Elevated Railway Company is, nevertheless, subject to the Federal income tax, since their duties did "not involve the exercise of an essentially governmental function", citing Flint v. Stone Tracy Co., 220 U.S. 107. See also article 88 of Regulations 69, and article 643 of Regulations 74.

On brief, the petitioners call attention to the fact that neither the Revenue Act of 1926 nor the Revenue Act of 1928 contains an express provision with respect to this type of exemption, which the Commissioner's Regulations purport to limit to the compensation for services rendered "in connection with the exercise of an essential governmental function."

The petitioners contend that the public operation of the Boston Elevated Railway Company was not the exercise of a proprietary right but of an essential governmental function; that in any event the board of trustees was a special public service commission for that railway, and as such engaged in an essential governmental function; and further, that the taxation of the compensation
31 here involved "constitutes an undue interference with the workings of the State Government."

The Supreme Court has recently considered the question of tax exemption of instrumentalities of the Federal Government and in Fox Film Corporation v. Doyal et al., — U.S. — (decided May 16, 1932), said:

"The principal of the immunity from State taxation of instrumentalities of the Federal Government, and of the corresponding immunity of State instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (McCullough v. Maryland, 4 Wheat. 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental

functions and their exertions.' Indian Motorcycle Co. v. United States, 283 U.S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon 'an entire absence of power' (Johnson v. Maryland, 254 U.S. 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government.' Willcuts v. Bunn, 282 U.S. 216, 225."

In Group No. 1 Oil Corporation v. Bass, 283 U.S. 279, 51 Sup.Ct. 432, 433, the Supreme Court pointed out that the immunity there contended for and applicable here, did not extend to a "nondiscriminatory tax" imposed by one government that remotely and indirectly affects another government.

The principal of immunity referred to in Fox Film Corporation v. Doyal et al., supra, had its genesis in McCullough v. State of Maryland, 4 Wheat. 316, wherein the Supreme Court held unconstitutional a discriminatory tax laid by the State of Maryland "on all banks or branches thereof in the State of Maryland, not chartered by the legislature." The facts of that case are too familiar to require further recital here. The principle there established has received elucidation by the Supreme Court in recent tax
32 cases in which it has reconsidered the principle of immunity and the nature of its "inherent limitations." See Fox Film Corporation v. Doyal et al., supra; Group No. 1 Oil Corporation v. Bass, supra; Indian Motorcycle Co. v. United States, 283 U.S. 570, 51 S.Ct. 601; Burnet v. Coronado Oil & Gas Co. — U.S. —, 52 S.Ct. 443.

There is no discrimination in the imposition of the tax in controversy, which is laid upon the net income of individuals, determined after certain credits and deductions from gross income, which includes "gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind, and in whatever form paid." Sections 210 to 213 of the Revenue Act of 1926, and sections 11, 12, 21 and 22 of the Revenue Act of 1928. And, as the Supreme Court said in Willcuts v. Dunn, 282 U.S. 216, 51 S.Ct. 125, 129:

". . . It must be remembered that we are dealing, not with any express constitutional restriction, but only with an asserted implication. The constitutional provisions authorizing the Congress to lay taxes (article 1, § 8, sixteenth amendment) are certainly broad enough to cover the tax in question. . . ."

Tax exemptions are never lightly to be inferred (Heiner v. Colonial Trust Co., 275 U.S. 232), must be given a practical construction such "as will not unduly impair the taxing power" of the Federal Government "or the appropriate exercise of its functions" by the State government (Susquehanna Co. v. Tax Commission, 283 U.S. 291, 294), and the constitutional exemption, if any, must be construed strictly against the taxpayer. (Pacific Company, Ltd., v. Johnson, — U.S. —, April 11, 1932.) The exemption claimed in

the instant proceedings, since there is no express statutory provision therefor, cannot be determined "apart from the purpose and character of the legislation" by which the Commonwealth of Massachusetts undertook the operation of the Boston Elevated Railway Company through a board of trustees, of which the petitioners were members. Cf. Shaw v. Oil Corporation, 276 U.S. 575, 578.

In Winthrop Coffin, supra, we found that the trustees of the
33 Boston Elevated Railway Company were officers of the Commonwealth of Massachusetts, despite the provisions of section 1 of chapter 159 of the Special Acts of 1918, which declared that the trustees "shall not be considered public officers." This conclusion was based upon other provisions of the act than section 1, and upon the interpretations placed thereon by the Supreme Court of Massachusetts. That determination is not dispositive of the issue now before us, since there the exemption claimed was found to be within section 1211 of the Revenue Act of 1926, which has no application to the years now in controversy. In section 2 of chapter 159 of the Special Acts of 1918, it is provided that the trustees "shall be deemed to be acting as agents of the company and not of the Commonwealth" and that the company remained liable for their acts just as if they were in the immediate employ of the company. In the opinion of the justices of the Supreme Judicial Court of Massachusetts, rendered April 2, 1919, and reported at 231 Mass. 603; 122 N.E. 763, 765, is the following:

". . . In essence Special Acts 1918, c. 159, was a legislative agreement for the lease to the commonwealth of a public utility to be operated for a limited time by public officers upon the payment of fair rental on an investment made under public supervision and under laws prohibiting stock watering or other means of inflation.

"We are led to the conclusion that said chapter 159 was within the constitutional power of the legislature."

In interpreting the provision of chapter 159 under which the trustees apportioned the amount to be assessed against certain cities and towns served by the railway and collected from such cities and towns as an addition to the State tax assessed, the Supreme Court of Massachusetts, in City of Boston *v.* Treasurer and Receiver General, 237 Mass. 403, 130 N.E. 390, affirmed its earlier opinion regarding chapter 159 of the Special Acts of 1918, and held constitutional section 14 of the act by which the deficiency in the earnings under sections 11 and 13 were assessed against the cities and towns served by the railway. In the course of that opinion the court said:

34 "Some analysis of the provisions of Sp. St. 1918, c. 159, is necessary in order to deal with the contentions that it is unconstitutional. Its general scope is indicated by its title, which is "An act to provide for the public operation of the Boston Elevated Railway Company." The accuracy of the title is confirmed by the substance of the act throughout. Its purpose is operation through public officers and not public ownership. . . ."

The court also stated that the Commonwealth had the constitutional power to assume the management and operation of the Boston Elevated Railway Company. But nowhere does the court undertake to say that the Commonwealth of Massachusetts was thereby engaged in an esential governmental function, although it upheld the tax levied under section 14 of the act on the grounds that the tax was levied for a public purpose. See also City of Chelsea *v.* Treasurer and Receiver General, 237 Mass. 422, 130 N.E. 397; Boston *v.* Jackson, 260 U.S. 309. In the opinion of the justices, rendered November 22, 1927, reported 159 N.E. 70, it appears that the corporate entity remained intact and that the property remained the property of the Boston Elevated Railway Company.

In January 1925 the Justices of the Supreme Judicial Court of Massachusetts rendered an opinion, reported 148 N.E. 889, 891, pointing out that the Commonwealth or local government had the power to acquire or construct instrumentalities for public travel and to charge toll, rental, or other recompense therefor (citing Commonwealth *v.* Wilkinson, 16 Pick. 175); such powers resting on the rights of the Commonwealth as proprietor of the instrumentalities used. Thus, it appears that in the opinion of the justices, rendered in connection with a question involving certain tunnels constructed by the city of Boston and leased to the Boston Elevated Railway Company, such instrumentalities are constructed and operated in the exercise of a proprietary right. Furthermore, regardless of the operation of the railway by the Commonwealth, the Supreme Court of Massachusetts has held the Boston Elevated Railway Company liable for damages during this period of operation. See Harter *v.* Boston Elevated Railway Co., 156 N.E. 543 (May 1927).

From a consideration of the above opinions pertaining to the legislation by which the Commonwealth of Massachusetts took over the operation of the Boston Elevated Railway, we conclude that chapter 159 of the Special Acts of 1918 was for a "public purpose" (which term is not synonymous with "governmental purpose", see T. P. Wittschen, 25 B.T.A. 46, 52), and for the time provided deprived the private corporation of the exercise of its proprietary rights and gave them to the board of trustees.

In Flint *v.* Stone Tracy Co., supra, the question of tax exemption was reviewed at length and governmental agencies and functions fully discussed. The Supreme Court, in considering the question of exemption as it related to public-service corporations, to wit, two rapid-transit corporations comparable to the Boston Elevated Railway Company, said:

". . . In the case of South Carolina *v.* United States, 199 U.S. 437, 50 L.ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737, this court held that when a State, acting within its lawful authority, undertook to carry on the liquor business, it did not withdraw the agencies of the State, carrying on the traffic, from the operation of the internal revenue laws of the United States. If a State may

not thus withdraw from the operation of a Federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is nevertheless, with a view to private profit, can have the effect of denying the Federal right to reach such properties and activities for the purposes of revenue.

"It is no part of the essential governmental functions of a State to provide *means of transportation*, supply artificial light, water, and the like. These objects are often accomplished through the medium of private corporations, and though the public may derive a benefit from such operations, the companies carrying on such enterprises are nevertheless private companies, whose business
36 is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other corporations upon which special franchises have been conferred.

"The true distinction is between the attempted taxation of those operations of the States *essential* to the execution of its governmental functions, and which the State *can only do itself*, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the State in carrying out its purposes; the latter, although regulated by the State, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation." [Italics supplied.]

The petitioners rely upon the decision of the Circuit Court of Appeals for the First Circuit in Jamestown & Newport Ferry Co. *v.* Commissioner, 41 Fed. (2d) 920, wherein the Ferry Company was held to be an instrumentality of government and not subject to the Federal income tax. That case is distinguishable from the proceedings at bar in that there the income from a public utility (the ferry), accrued to a political subdivision of a State and was specifically exempted from Federal taxation by section 213 (b) (7) of the Revenue Acts of 1921 and 1924. There, the ferry corporation was owned and operated by a town located on an island. Likewise, the decision of the Circuit Court of Appeals for the Ninth Circuit in United States *v.* King County, Wash., et al., 281 Fed. 686, is cited and relied upon. There the county owned and operated a ferry which the court held exempt from the transportation tax imposed by section 500 of the Revenue Act of 1917. In both cases there was a direct burden upon or interference with a political subdivision of a State. Likewise, the decision of the District Court for the Eastern District of Michigan in Frey *v.* Woodworth, 2 Fed. (2d) 725, is distinguishable in that the exemption granted applied to the income of an employee of a municipally owned and operated street railway. The District Court relied upon the earlier
37 decision in United States *v.* King County, Wash., et al., supra, from which it construed the ownership and operation of the street-railway system by the city of Detroit to be the exer-

cise of a strictly governmental function. The record discloses that the Boston Elevated Railway continued to be owned by the private corporation and that at no time did the Commonwealth of Massachusetts own the railway; thus, in this particular, if in no other, the instant proceedings are distinguishable from those cases relied upon by the petitioners.

Contrasting with the decisions cited by the petitioners, involving ferries and street railways owned and operated by political subdivisions of a State, are the decisions of the District Court, District of Massachusetts, involving the Boston Elevated Railway Company. That court held in Boston Elevated R. Co. v. Malley, 288 Fed. 864 (1923), that the railway was subject to the three percent transportation tax imposed by section 500 of the Revenue Act of October 3, 1917, and in Boston Elevated R. Co. v. Malley 24 Fed. (2d) 758 (1928), that it was subject to the capital-stock tax imposed by section 1000 (a) (1) of the Revenue Act of 1918, while being operated under chapter 159, Special Acts of 1918, by the board of trustees therein provided. In the first case, the court pointed out that the tax was not paid by the Commonwealth of Massachusetts, and in the latter said:

"It should perhaps be noticed that the special act reserved to the Commonwealth and its subdivisions the right 'to tax the company or its stockholders in the same manner and to the same extent as if the company had continued to manage and operate its own property', section 2. It will be a curious arrangement under which the corporation continued to be fully taxable as such for the benefit of the Commonwealth, while it escaped taxation by the Federal Government."

The petitioners further argue that in substance the board of trustees of the Boston Elevated Railway Company constituted a special public service commission for the Boston Elevated Railway and as such they were engaged in an essential governmental function, to wit, regulating the operations of such railway, citing
38 Burnet v. Livezey, 48 Fed. (2d) 159. After the enactment of chapter 159 of Special Acts of 1918 the Public Service Commission of the Commonwealth of Massachusetts continued its functions and duties with respect to public utilities other than the Boston Elevated Railway; thereafter, pursuant to the statute, that railway was operated by the trustees, who at all times acted as "agents of the company and not of the Commonwealth" (section 2, chapter 159, Special Acts of 1918); public regulation abdicated in favor of public operation, and thereafter public regulation was restricted in the manner provided in section 15 of chapter 159, which perhaps was an inducement to the private corporation to subject its property to public operation, during and after which the stockholders of the private corporation were assured a fixed return upon their investment. Burnet v. Livezey, supra, held that an attorney for the Public Service Commission of the State of

West Virginia was employed by an agency of the State performing governmental functions and that his income was exempt from Federal taxation. Here, these petitioners were not members of the Public Service Commission of Massachusetts, nor were they employed by such Commission. The functions of regulation that they exercised were incidental to the public operation. Furthermore, Burnet v. Livezey arose under section 1211 of the Revenue Act of 1926 as applied to the taxable year 1923. Contrast with that decision the holdings in Blair v. Byers, 35 Fed. (2d) 326, and T. P. Wittschen, supra.

In Leon S. Moisseiff, 21 B.T.A. 515, this Board held that the Delaware River Bridge Joint Commission created by legislative enactments of the States of Delaware and Pennsylvania, and the Port of New York Authority, similarly created by legislative enactments of the States of New York and New Jersey, were governmental instrumentalities and that the compensation paid to an employee thereof was exempt from Federal income tax. In that case, the instrumentalities employed by the States concerned were engaged in providing bridge facilities in furtherance of commerce, and making harbor improvements in aid of navigation, and in so
39 doing did not merely take over and operate a private corporation, as in the instant proceedings. In the case of the States of New York and New Jersey, the legislatures thereof expressly provided that the port authority be regarded as performing a governmental function (see page 526); the same inference is drawn from the legislation creating the Delaware River Bridge Joint Commission. Neither enterprise was carried out by the public operation of private property, as in the instant proceedings. Obviously, therefore, that case is not authority for holding tax exempt the income income of these petitioners.*

The record discloses that the compensation of these petitioners as trustees was paid neither directly nor indirectly by the Commonwealth of Massachusetts. The salaries in question were paid by the Boston Elevated Railway Company and it was only in the event of the unsuccessful operation of the railway that the Commonwealth would be called upon to contribute any sum toward the expense of the railway. It appears that over $3,000,000 was advanced by the Commonwealth of Massachusetts in 1919 for this purpose, but that the operations of subsequent years, and particularly the taxable years under consideration, were successful and in some measure the Commonwealth was reimbursed for the amount advanced in 1919. In this particular, the instant proceedings are distinguishable from the situation involved in Biscoe v. Tax Commissioner, 236 Mass. 201, 128 N.E. 16, wherein there was no decision on the question of an essential governmental function, but where the Supreme Court of Massachusetts held that compensation received by a Federal manager and a solicitor of railways, under the supervision of the Director General of Rail-

roads during the period of Federal control, was exempt from the Massachusetts State income tax imposed by chapter 269 of the Statutes of 1916, which in section 5 (b) specifically exempted the salaries of employees and officers of the United States Government. It appears that the moneys out of which the compensation was paid were so handled as to become the moneys of the United States Government and that the taxpayers' compensation was paid by voucher drawn either directly or indirectly upon the Federal Government. The facts in the instant proceedings are vitally different. The test applied by the Massachusetts statute was met in Biscoe v. Tax Commissioner, supra, whereas the test applicable in the instant proceedings has not been met.

From a full consideration of the facts of record in the light of the recent decisions of the Supreme Court, we are of the opinion that the compensation received by these petitioners as trustees of the Boston Elevated Railway Company from the company in the years 1926 to 1929, inclusive, is subject to the Federal income tax asserted by the respondent. These petitioners were engaged in the public operation of private property, as agents of a private corporation, the stockholders of which were assured a fixed return upon their investment during and after public operation, and the railway at all times continued subject to taxation and liable for the acts of its agents. Although public officials, as that term has been liberally interpreted, they were not exercising essential governmental functions in the performance of their duties. The taxation of the compensation in question places no burden upon the Commonwealth of Massachusetts and there is no interference with any essential governmental function of that Commonwealth.

Reviewed by the Board.

Judgments will be entered for the respondent.

Murdock and Goodrich concur in the result.

Before United States Board of Tax Appeals, Washington

Docket No. 47836

LELAND POWERS, EXECUTOR OF THE ESTATE OF SAMUEL L. POWERS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Entered October 27, 1932

Pursuant to the determination of the Board, as set forth in its report promulgated October 27, 1932, it is ordered and decided: That there is a deficiency of $553.44 for the year 1927.

CHARLES P. SMITH, *Member.*

41 Before United States Board of Tax Appeals, Washington

Docket No. 51029

WINTHROP COFFIN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Entered October 27, 1932

Pursuant to the determination of the Board, as set forth in its report promulgated October 27, 1932, it is ordered and decided: That there is a deficiency of $934.29 for the year 1927.

CHARLES P. SMITH, *Member.*

Before United States Board of Tax Appeals, Washington

Docket No. 61846

HENRY I. HARRIMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Entered October 27, 1932

Pursuant to the determination of the Board, as set forth in its report promulgated October 27, 1932, it is ordered and decided: That there is a deficiency of $955.66 for the year 1929.

CHARLES P. SMITH, *Member.*

Before United States Board of Tax Appeals

Docket No. 47836

[Title omitted.]

Petition for review

Filed December 22, 1932

The above-named petitioner, Leland Powers, hereby petitions for review of a decision of the United States Board of Tax Appeals rendered upon his appeal numbered in the docket of said Board as above and in support of this his said petition avers as follows:

42 I. The petitioner is an individual residing at 124 Chestnut Hill Road, Newton, in the county of Middlesex and Commonwealth of Massachusetts, and is the duly appointed and qualified executor of the estate of Samuel L. Powers, late of said Newton.

II. The controversy relates to the Federal income tax of the petitioner's decedent for the calendar year 1927. The petitioner claims that the salary received by the petitioner's decedent in the year 1927 as one of the public trustees of the Boston Elevated Railway Company is not subject to the Federal income tax. The Commissioner of Internal Revenue has disallowed this claim, has included said salary in the taxable income of the petitioner's decedent, and in consequence has asserted, and the said Board of Tax Appeals has now by its decision entered October 27, 1932, affirmed, a deficiency for the said year in the sum of $553.44, which decision and deficiency your petitioner asserts to be erroneous.

III. Review of the said decision is sought in the United States Circuit Court of Appeals for the First Circuit.

IV. And the petitioner assigns as errors committed by the said Board in the proceedings and decision aforesaid the following:

(1) The Board erred in its ruling that "the constitutional exemption, if any, must be strictly construed against the taxpayer."

(2) The Board erred in its application to the present case of the authority of Flint v. Stone Tracy Co., 220 U.S. 107, if and insofar as it purported thereby to rule, upon the facts of the present case, that a State is never engaged in the performance of an essential governmental function when dealing with the providing of means of transportation for its inhabitants.

(3) The Board erred in its finding and ruling, upon the evidence, that the functions of regulation exercised by the petitioner's decedent as one of the public trustees were incidental to the public operation of the railway; insofar as the Board thereby, read in conjunction with the remainder of its opinion, purported to rule that the functions of regulation were merely incidental to the functions of operation con-

43 trary to the petitioner's contention that the functions of operation were incidental to and an extension of the functions of regulation for the purpose of rendering the same more effective.

(4) The Board erred in finding and ruling, upon the evidence, that the compensation of the petitioner's decedent as trustee was paid neither directly nor indirectly by the Commonwealth of Massachusetts.

(5) The Board erred in ruling, if and insofar as it did so rule, that the fact if true that the compensation of the petitioner's decedent as trustee was paid neither directly nor indirectly by the Commonwealth of Massachusetts was decisive against the petitioner's case.

(6) The Board erred in finding and ruling, upon the evidence, that the compensation received by the petitioner's decedent as

trustee of the Boston Elevated Railway for the year 1927 was subject to the Federal income tax asserted by the respondent.

(7) The Board erred in finding and ruling, upon the evidence, that the petitioner's decedent although a public official was not exercising essential governmental functions in the performance of his duties.

(8) The Board erred in finding and ruling, upon the evidence, that the taxation of the compensation in question places no burden upon the Commonwealth of Massachusetts.

(9) The Board erred in finding and ruling, upon the evidence, that "there is no interference with any essential governmental function of that Commonwealth."

Wherefore the petitioner prays that the said decision may be reviewed by the said United States Circuit Court of Appeals for the First Circuit and be reversed and the said deficiency disallowed.

LELAND POWERS,
Executor of the Estate of Samuel L. Powers.

[*Duly sworn to by Leland Powers, jurat omitted in printing.*]

44 Before United States Board of Tax Appeals

Docket No. 47836

[Title omitted.]

Affidavit of service of petition for review

Filed January 20, 1933

Melville F. Weston, of lawful age, having been first duly sworn, upon his oath states:

That he served the petition for review in the above-entitled case and notice of filing the same on the Commissioner of Internal Revenue by sending a copy of said petition with a letter of notification of which the attached is a correct copy by registered United States mail to C. M. Charest, Esq., general counsel, Bureau of Internal Revenue at Washington, D.C.; that said copy and letter were enclosed in an envelope bearing the return address of Powers & Hall, 30 Federal Street, Boston, Massachusetts, and properly addressed to said C. M. Charest, Esq., as aforesaid; that said copy and letter so registered were deposited in the United States mail on January 6, 1933.

MELVILLE F. WESTON,

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *January 18, 1933.*

Subscribed and sworn to, before me,
[SEAL]

MATT B. JONES, JR.,
Notary Public.

Before United States Board of Tax Appeals

Docket No. 51029

[Title omitted.]

Petition for review

Filed December 22, 1932

The above-named petitioner, Winthrop Coffin, hereby petitions for review of a decision of the United States Board of Tax
45 Appeals rendered upon his appeal numbered in the docket of said Board as above and in support of this his said petition avers as follows:

I. The petitioner is an individual residing at 45 Warren Street, Brookline, in the county of Norfolk and Commonwealth of Massachusetts.

II. The controversy relates to the Federal income tax of the petitioner for the calendar year 1927. The petitioner claims that the salary received by him in the year 1927 as one of the public trustees of the Boston Elevated Railway Company is not subject to the Federal income tax. The Commissioner of Internal Revenue has disallowed this claim, has included said salary in the petitioner's taxable income, and in consequence has asserted, and the said Board of Tax Appeals has now by its decision entered October 27, 1932, affirmed, a deficiency for the said year in the sum of $934.29, which decision and deficiency your petitioner asserts to be erroneous.

[Memorandum. The remaining paragraphs III to IV (9), being the same as those in no. 47836, printed at pages 42 and 43, are here omitted. A. I. Charron, clerk.]

Wherefore the petitioner prays that the said decision may be reviewed by the said United States Circuit Court of Appeals for the First Circuit and be reversed and the said deficiency disallowed.

WINTHROP COFFIN.

[*Duly sworn to by Winthrop Coffin, jurat omitted in printing.*]

46 Before United States Board of Tax Appeals

Docket No. 51029

[Title omitted.]

Affidavit of service of petition for review

Filed January 20, 1933

[Memorandum. The affidavit of service, being the same as that in no. 47836, already printed at page 44, is here omitted. A. I. Charron, clerk.]

Before United States Board of Tax Appeals

Docket No. 61846

[Title omitted.]

Petition for review

Filed December 22, 1932

The above-named petitioner, Henry I. Harriman, hereby petitions for review of a decision of the United States Board of Tax Appeals rendered upon his appeal numbered in the docket of said Board as above and in support of this his said petition avers as follows:

I. The petitioner is an individual residing at 825 Centre Street, Newton, in the county of Middlesex and Commonwealth of Massachusetts.

II. The controversy relates to the Federal income tax of the petitioner for the calendar year 1929. The petitioner claims that the salary received by him in the year 1929 as one of the public trustees of the Boston Elevated Railway Company is not subject to the Federal income tax. The Commissioner of Internal Revenue has disallowed this claim, has included said salary in the petitioner's taxable income, and in consequence has asserted, and the said Board of Tax Appeals has now by its decision entered October 27, 1932,
47 affirmed, a deficiency for the said year in the sum of $955.66, which decision and deficiency your petitioner asserts to be erroneous.

[Memorandum. The remaining paragraphs, III to IV (9), being the same as those in no. 47836, already printed as pages 42 and 43, are here omitted. A. I. Charron, clerk.]

Wherefore the petitioner prays that the said decision may be reviewed by the said United States Circuit Court of Appeals for the First Circuit and be reversed and the said deficiency disallowed.

HENRY I. HARRIMAN.

[*Duly sworn to by Henry I. Harriman, jurat omitted in printing.*]

Before United States Board of Tax Appeals

Docket No. 61846

[Title omitted.]

Affidavit of service of petition for review

Filed January 20, 1933

[Memorandum. The affidavit of service being the same as that in no. 47836, already printed at page 44, is here omitted. A. I. Charron, clerk.]

48 Before United States Board of Tax Appeals

Docket No. 47836

[Title omitted.]

Statement of the evidence

Lodged December 22, 1932. Filed January 20, 1933

The above-entitled appeal was consolidated for hearing and decision with four other pending cases (Stanley R. Miller, no. 48007; Stanley R. Miller, no. 50575; Henry I. Harriman, no. 61846; Winthrop Coffin, no. 51029). The evidence consisted of stipulations of facts severally entered into by each petitioner and the respondent. The stipulation which constituted the entire evidence upon the above-entitled appeal was as follows:

It is hereby stipulated and agreed by and between the parties in the case entitled and numbered as above that the following facts are true:

1. All facts alleged in the petition and admitted by the answer of the respondent thereto.

2. The office of trustee of the Boston Elevated Railway Company was created by chapter 159 of the Special Acts of 1918 of the Commonwealth of Massachusetts, which act was passed in May 1918 and went into full force and effect in that year, all prescribed conditions, as to acceptance by stockholders and the like, having been fulfilled. Said act was in force and effect throughout the year 1927. For the general background in fact of this legislation, reference may be made to the various decisions and opinions of the Supreme Judicial Court of Massachusetts and the United States Supreme Court wherein the same is discussed, cited in the decision of the Board in the case of Winthrop Coffin v. Commissioner of Internal Revenue, 12 B.T.A. 703.

3. The petitioner's decedent was duly qualified for appointment to the office of member of the Board of Trustees of the Boston Elevated Railway Company. As required by section 1 of said act,
49 he did not own any stock or other securities of the Boston Elevated Railroad Company or of any company owned, leased, or operated by it.

4. If material, the Commonwealth in the year 1919 became required, under the terms of said act, and especially section 11 thereof, to pay over to the board of trustees of the Boston Elevated Railway Company the sum of $3,980,151.67. This amount was determined by the board of trustees of the Boston Elevated Railway Company and by them apportioned among the cities and towns in which the railway was operated. No reimbursements were made to the Commonwealth on account of said payment prior to 1922 nor in the year 1924. Operations during the years down to and including 1928 did not result in an excess sufficient to enable the full reimbursement of the $3,980,151.67 to the Commonwealth.

5. The deficiency in tax involved in the petition arises wholly from the inclusion by the Commissioner of the salary of the petitioner's decedent as one of the trustees of the Boston Elevated Railway Company for the year in question.

6. The tax return of the petitioner's decedent for the year in question may be placed in evidence. The said chapter 159 of the Special Acts of 1918 of the Commonwealth of Massachusetts may be judicially noticed, and as well any other pertinent provision of Massachusetts or United States law.

MELVILLE F. WESTON,
Attorney for Petitioner.

C. M. CHAREST,
Attorney for Respondent.

Agreed to January 19, 1933.

C. M. CHAREST,
Attorney for Petitioner.

Approved and ordered filed this twentieth day of January 1933.
CHARLES P. SMITH, *Member.*

[Memorandum. By stipulation and agreement between the parties the statements of the evidence in the cases of Winthrop Coffin, B.T.A. no. 51029, and Henry I. Harriman, B.T.A. no. 61846, being in all material respects identical with the statement of the evidence in the case of Leland Powers, executor, B.T.A. no. 47836, the same are omitted in the printing of the record.]

50

Before United States Board of Tax Appeals

[Titles omitted.]

Docket No. 51029

Docket No. 61846

Docket No. 47836

Praecipe for transcript of record

Filed January 19, 1933

To the Clerk of the United States Board of Tax Appeals:

Will you please prepare at the petitioners' expense and transmit forthwith to the clerk of the United States Circuit Court of Appeals for the First Circuit a transcript of the record in the causes entitled and numbered as above, including therein the following papers and proceedings, namely:

1. The docket entries of the proceedings before the United States Board of Tax Appeals in the said causes.

2. The pleadings before the Board.
3. The findings of fact and opinion of the Board.
4. The decision of the Board entered upon each of said appeals pursuant to the said findings of fact and opinion.
5. The petitions for review including affidavit of service of petition for review.
6. The statement of the evidence.
7. This praecipe.

The foregoing to be prepared, certified, and transmitted as
51 required by law and the rules of the United States Circuit Court of Appeals for the First Circuit.

MELVILLE F. WESTON,
Attorney for Petitioners,
30 Federal Street, Boston, Massachusetts.

January 18, 1933.

Service of a copy of the foregoing is hereby acknowledged this nineteenth day of January 1933.

C. M. CHAREST,
Attorney for Respondent.

[Clerk's certificate to foregoing transcript omitted in printing.]

52 Before United States Board of Tax Appeals

Docket no. 48007

STANLEY R. MILLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:
For taxpayer: Stanley R. Miller, Esq.
For Commissioner: Harold Allen, Esq.

Docket entries

1930

Mar. 28—Petition received and filed. Taxpayer notified. (Fee paid.)
" 29—Copy of petition served on general counsel.
Apr. 26—Answer filed by general counsel.
May 9—Copy of answer served on taxpayer. General Calendar.

1931

Feb. 11—Motion to consolidate with dockets 51029 and 47836 filed by taxpayer.
" 14—Motion granted.

[Memorandum.—The remaining docket entries, February 11, 1932, to February 19, 1933, being practically the same as those printed in no. 47836 at pages 1 and 2, are here omitted. A. I. Charron, clerk.]

53 Before United States Board of Tax Appeals

Docket No. 50575

STANLEY R. MILLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:

For taxpayer: Melville F. Weston, Esq., Robert H. Montgomery, Esq.

For Commissioner: Harold Allen, Esq.

Docket entries

1930
Nov. 1—Petition received and filed. Taxpayer notified. (Fee paid.)
" 3—Copy of petition served on general counsel.
Dec. 22—Answer filed by general counsel.
1931
Jan. 14—Copy of answer served on taxpayer. General calendar.
Feb. 11—Motion to consolidate with dockets 51029, 47836, and 48007 filed by taxpayer.
" 14—Motion granted.

[Memorandum. The remaining docket entries, February 11, 1932, to February 19, 1933, being practically the same as those printed in no. 47836 at pages 1 and 2, are here omitted. A. I. Charron, clerk.]

54 Before United States Board of Tax Appeals

Docket No. 48007

[Title omitted.]

Petition

Filed March 28, 1930

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency symbolized IT: AR: B-12 JMF-60D dated February 13, 1930, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 1258 Beacon Street, Brookline, Massachusetts (formerly residing at 280 Dudley Street in said Brookline).

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on February 13, 1930.

3. The taxes in controversy are income taxes for the years 1926 and 1927, and for five hundred seventy-five and 25/100 dollars ($575.25), the entire amount of said alleged deficiency.

4. The Commissioner has held that the salary, amounting to five thousand dollars ($5,000), received by the petitioner as a member of the board of trustees of the Boston Elevated Railway Company for and during each of the years 1926 and 1927 under the provisions of chapter 159 of the Special Acts of the General Court of Massachusetts for the year 1918, is subject to an income tax imposed by the Revenue Act of 1926 because said salary received by the petitioner as an officer of the Commonwealth of Massachusetts "was not derived from the exercise of any essential governmental function as provided by section 213 (c) (7) of the Revenue Act of 1926, and article 88, Regulations 69." Said determination of tax as set forth in the said notice of deficiency is based upon the following errors:

55 (a) The determination that the petitioner did not receive said salary from the exercise of any essential governmental function.

(b) The requirement that said salary of said petitioner must have been received for services rendered in connection with the exercise of an essential governmental function of the Commonwealth of Massachusetts in order to be exempt from taxation.

(c) The ruling that section 213 (c) (7) of the Revenue Act of 1926 (even assuming 213 (b) (7) is intended to be referred to) provides for or justifies the inclusion of said salary in gross income.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

On June 26, 1918, the petitioner was appointed by the Governor of the Commonwealth of Massachusetts, with the advice and consent of the executive council, a member of the board of trustees of the Boston Elevated Railway Company under the provisions of chapter 159 of the Special Acts of the General Court of said Commonwealth for 1918, entitled "An act to provide for the public operation of the Boston Elevated Railway Company", for a term of office expiring July 1, 1928, and thereupon qualified for said office by taking the oaths required by the Constitution and laws of the Commonwealth of Massachusetts to be taken by public officials before entering upon the discharge of their duties. On the foregoing facts this Board held in the petitioner's case, docket no. 17002, promulgated June 19, 1926, that the petitioner was an officer of the Commonwealth of Massachusetts.

Acting under the provisions of said act, the board of trustees did assume the management and operation of the properties of the Boston Elevated Railway Company on July 1, 1918, and since that date and during the taxable years in question had possession of said properties in behalf of the Commonwealth.

During each of the years 1926 and 1927, by virtue of said appointment and qualification, the petitioner acted as said trustee and officer of the Commonwealth of Massachusetts and received as salary therefor the sum of five thousand dollars ($5,000), pursuant to the terms of said act.

The act above referred to transferred to the board of trustees
56 powers of management and operation previously vested in the board of directors of the private corporation. The powers thus transferred include the right to make contracts in the name of the corporation; to receive and pay out all income or other moneys to which it is entitled; to issue stock, bonds, or promissory notes of the company; and to appoint and remove all officers of the company other than the board of directors.

Under said act the trustees are also given the right to regulate and fix fares, including the issue, granting, and withdrawal of transfers, and the imposition of charges therefor, and to determine the character and extent of the service and facilities to be furnished and "in these respects their authority shall be exclusive and shall not be subject to the approval, control, or direction of any other State board or commission." Powers were thus given the board of trustees which had been previously vested in and exercised by the Public Service Commission of the Commonwealth of Massachusetts, and by virtue of said chapter 159 said board of trustees became at all times after July 1, 1918, a special public service commission in respect to the Boston Elevated Railway Company.

A more extended statement of the separate provisions of said chapter 159 is here omitted in view of the former decision of this Board in the case docket no. 17002 between the same parties, but said chapter 159 which became effective in all its provisions. is hereby attached, marked "Exhibit B", and made a part hereof.

6. Therefore the petitioner says that in exercising the powers given to, and performing the duties placed upon, the petitioner, as one of said board of trustees, he was a public officer of the Commonwealth of Massachusetts, that he was discharging the duties of an office which involved the exercise of an essential governmental function, that as said officer he received the salary on which the Commissioner has determined said deficiency tax is due and that whatever compensation he received is not taxable under said Revenue Act of 1926; and the petitioner prays for relief from the deficiency asserted by the respondent on the following particulars:

57 (a) The entire amount of deficiency as determined by the Commissioner as above set forth.

Wherefore, the petitioner prays that this Board may hear and disallow the deficiency determined by the Commissioner as above set forth.

STANLEY R. MILLER,
Petitioner, 31 Milk Street, Boston, Massachusetts.

[*Duly sworn to by Stanley R. Miller, jurat omitted in printing.*]

Exhibit A to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, February 13, 1930.

Mr. STANLEY R. MILLER,
280 Dudley Street, Brookline, Massachusetts.

SIR: In accordance with section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1926 and 1927 discloses a deficiency of $575.25, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed Form 866 and forward both original and
58 duplicate to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBT. H. LUCAS,
Commissioner.
By DAVID BURNET,
Deputy Commissioner.

Inclosures: Statement. Form 866. Form 882.

STATEMENT

IT:AR:B-12. JMF-60D. FEBRUARY 13, 1930.

In re: Mr. Stanley R. Miller, 280 Dudley Street, Brookline, Massachusetts

Tax liability

Year	Corrected tax liability	Tax previously assessed	Deficiency
1926	$373.50	$132.61	$240.89
1927	608.77	274.41	334.36
Totals	$982.27	$407.02	$575.25

Information on file in this office discloses that for each of the years under consideration you received a salary of $5,000.00 as one of five trustees for the State of Massachusetts of the Boston Elevated Railway Company, which amount was not reported in your returns.

1926

Total net income reported	$12,032.13
Add: Salary from Boston Elevated Railway Co	5,000.00
Net income adjusted	$17,032.13

The amount of $5,000.00 has been added to income reported
59 for the reason it is held that the salary was not derived from the exercise of any essential governmental function as provided by section 213 (c) (7) of the Revenue Act of 1926, and article 88, Regulations 69. You are informed that to be entitled to the exemption provided by the Revenue Act of 1926 the services must have been rendered in connection with the exercise of an essential governmental function of the state or political subdivision. In this connection your attention is called to General Counsel Memorandum #3142, published in Cumulative Bulletin VII–1 at page 78.

COMPUTATION OF EARNED INCOME CREDIT

Earned in come reported	$12,859.79
Salary	5,000.00
Total earned income	$17,859.79
Less: Personal exemption	4,700.00
Balance subject to normal tax	$13,159.79
Normal tax at 1½% on $4,000.00	$60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $5,159.79	257.99
Surtax on $17,859.79	135.79
Total	$573.78
25% of $573.78	143.44

Under the provisions of section 209 (b) of the Revenue Act of 1926 the earned income credit is limited to 25% of the normal tax plus 25% of the surtax on earned income, or $132.94, computed as follows:

Normal tax	$395.98
Surtax on earned income	135.79
Total	531.77
Earned income credit of 25%	132.94

60 COMPUTATION OF TAX

Net income adjusted		17,032.13
Less:		
Dividends	$12.50	
Personal exemption	4,700.00	
		4,712.50
Balance subject to normal tax		12,319.63

COMPUTATION OF TAX—Continued

Normal tax at 1½% on $4,000.00		$60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $4,319.63		215.98
Surtax on $17,032.13		110.96
Total		$506.94
Less:		
Earned income credit	$132.94	
Income tax paid at source	.50	
		133.44
Tax liability		$373.50
Previously assessed		132.61
Deficiency		$240.89

1927

Total net income reported	$15,410.20
Add: Salary from Boston Elevated Railway Company	5,000.00
Net income adjusted	$20,410.20

The amount of $5,000.00 salary has been added to income reported for the same reason fully explained above for the year 1926.

COMPUTATION OF EARNED INCOME CREDIT

Earned income reported	$16,589.89
Salary	5,000.00
Total earned income	21,589.89
Earned income limited by section 209 (b) of the Revenue Act of 1926	20,000.00
Less: Personal exemption	4,700.00
Balance subject to normal tax	15,300.00
61 Normal tax at 1½% on $4,000.00	$60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $7,300.00	365.00
Surtax on $20,000.00	220.00
Total	765.00
Earned income credit of 25%	191.25

COMPUTATION OF TAX

Net income adjusted	20,410.20
Less: Personal exemption	4,700.00
Balance subject to normal tax	15,710.20
Normal tax at 1½% on $4,000.00	60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $7,710.20	385.51
Surtax on $20,410.20	240.51
Total	806.02
Less:	
Earned income credit	$191.25
Income tax paid at source	6.00
	197.25
Tax liability	608.77
Tax previously assessed	274.41
Deficiency	334.36

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Exhibit B

CHAPTER 159, SPECIAL ACTS, 1918

[Memorandum. Omitted by direction of counsel. A. I. Charron, clerk.]

62 Before United States Board of Tax Appeals

Docket No. 48007

[Title omitted.]

Answer

Filed April 26, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by above-named taxpayer, admits and denies as follows:

1. Admits the averments contained in paragraph 1.
2. Admits the averments contained in paragraph 2.
3. Admits the averments contained in paragraph 3.
4. Denies error in the action stated in paragraph 4.
5. Admits the averments contained in paragraph 5.
6. Admits the averments contained in paragraph 6 with the exception of the averment that petitioner's compensation is not taxable under the Revenue Act of 1926, which averment is denied.

Wherefore, it is prayed that the taxpayer's petition be denied.

[SEAL] C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
HAROLD ALLEN,
Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

[Title omitted.]

Docket 48007

Amended answer

Filed August 26, 1932

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for amended

answer to the petition filed by above-named taxpayer, admits and denies as follows:

1. Admits the averments contained in paragraph 1.
2. Admits the averments contained in paragraph 2.
3. Admits the averments contained in paragraph 3.
4. Denies error in the action stated in paragraph 4.
5. Admits the averments contained in paragraph 5.
6. Admits the averments contained in paragraph 6 with the
63 exception of the averment that petitioner's compensation is not taxable under the Revenue Act of 1926, and the averment that petitioner was discharging the duties of an office which involved the exercise of an essential governmental function, which averments are denied.

Wherefore, it is prayed that the taxpayer's petition be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
HAROLD ALLEN,
Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Docket no. 50575

[Title omitted.]

Petition

Filed November 1, 1930

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency symbolized IT:AB:B–1 DAC–60D dated September 26, 1930, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 1258 Beacon Street, Brookline, Massachusetts, and having a regular and usual place of business at 31 Milk Street, Boston, Massachusetts.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to petitioner on September 26, 1930.

3. The tax in controversy is an income tax for the year 1928 and for two hundred twenty-six and 92/100 dollars ($226.92), the entire amount of said alleged deficiency.

4. The Commissioner has held that the salary, amounting to five thousand dollars ($5,000), received by the petitioner as a
64 member of the board of trustees of the Boston Elevated Railway Company for and during the calendar year 1928 under the provisions of chapter 159 of Special Acts of the General Court of Massachusetts for the year 1918 is subject to an income tax imposed by the Revenue Act of 1926 and amendments thereto because

said salary received by the petitioner as an officer of the Commonwealth of Massachusetts " was not derived from the exercise of an essential governmental function as provided by article 643 of Regulations 74."

Said determination of tax as set forth in the said notice of deficiency is based upon the following errors:

(a) The determination that the petitioner did not receive said salary from the exercise of any essential governmental function.

(b) The requirement that said salary of said petitioner must have been received for services rendered in connection with the exercise of an essential governmental function of the Commonwealth of Massachusetts in order to be exempt from taxation.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

On June 26, 1918, the petitioner was appointed by the Governor of the Commonwealth of Massachusetts, with the advice and consent of the executive council, a member of the board of trustees of the Boston Elevated Railway Company under the provisions of chapter 159 of the Special Acts of the General Court of said Commonwealth for 1918, entitled "An act to provide for the public operation of the Boston Elevated Railway Company ", for a term of office extending until July 1, 1928, and thereafter until a successor should be appointed and qualified and thereupon the petitioner qualified for said office by taking the oaths required by the Constitution and laws of the Commonwealth of Massachusetts to be taken by public officials before entering upon the discharge of their duties. On the foregoing facts this Board held in the petitioner's case Docket Number 17002, promulgated June 19, 1926, that the petitioner was an officer of the Commonwealth of Massachusetts. On December 26, 1928, the petitioner was reappointed by the Governor of the Commonwealth
65 of Massachusetts, with the advice and consent of the executive council, a member of the board of trustees of said Boston Elevated Railway Company under the provisions of said chapter 159 for a further term of ten years from July 1, 1928, and he thereupon qualified for said office on December 27, 1928, by taking the oaths required by the Constitution and laws of the Commonwealth of Massachusetts to be taken by public officials before entering upon the discharge of their duties and thereby the petitioner continued (an officer of the Commonwealth of Massachusetts throughout the calendar year 1928).

Acting under the provisions of said act the board of trustees did assume the management and operation of the properties of the Boston Elevated Railway Company on July 1, 1918 and since that date and during the taxable year in question had possession of said properties in behalf of the Commonwealth.

During the year 1928 by virtue of said appointments and qualifications the petitioner acted as said trustee and officer of the Com-

monwealth of Massachusetts and received as salary therefor the sum of five thousand dollars ($5,000) pursuant to the terms of said act.

[Memorandum. The remainder of this petition being the same as the petition in no. 48007, printed at pages 55 to 57, inclusive, is here omitted. A. I. Charron, clerk.]

Wherefore, the petitioner prays that this Board may hear and disallow the deficiency determined by the Commissioner as above set forth.

STANLEY R. MILLER,
Petitioner, 31 Milk Street, Boston, Massachusetts.

[*Duly sworn to by Stanley R. Miller, jurat omitted in printing.*]

66 *Exhibit A to petition*

TREASURY DEPARTMENT,
Washington, September 26, 1930.

Mr. STANLEY R. MILLER,
31 Milk Street, Boston, Massachusetts.

SIR: You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $226.92 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P–7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest paid terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. WILMER,
Deputy Commissioner.

Enclosures: Statement. Form 882. Form 870.

67 STATEMENT

IT:AR:B-1. DAC-60D.

In re: Mr. Stanley R. Miller, 31 Milk Street, Boston, Massachusetts

Tax liability

Year	Corrected tax liability	Tax previously assessed	Deficiency
1928	$354.44	$127.52	$226.92

The report of the internal revenue agent in charge at Boston, Massachusetts, covering your income tax liability for the year 1928 has been reviewed and approved as submitted. The report shows the following adjustment:

	1928
Net income reported on your return	$12,340.44
Add: 1. Salary from Boston Elevated Railway Co	5,000.00
Net income adjusted	17,340.44
COMPUTATION OF TAX	
Net income subject to surtax	17,340.44
Less: Personal exemption and credit for dependents	4,300.00
Balance subject to normal tax	13,040.44
Normal tax at 1½% on $4,000.00	60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $5,040.44	252.02
Surtax on $17,340.44	120.21
Total	552.23
Less: Credit of 25% of the tax on earned net income	197.79
Total tax assessable	354.44
Tax previously assessed	127.52
Deficiency	226.92
COMPUTATION OF EARNED INCOME CREDIT	
Earned net income reported	17,652.30
Add: Salary	5,000.00
Earned net income adjusted	22,652.30
68 Earned net income subject to tax	22,652.30
Less: Personal exemption and credit for dependents	4,300.00
Balance	18,352.30
Normal tax at 1½% on $4,000.00	60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $10,352.30	517.61
Surtax on $22,652.30	359.14
Total	1,056.75
Credit: 25% (not over 25% of items 28, 42, 43, and 44) credit limited to $197.79	264.19

EXPLANATION OF CHANGE

1. Salary of $5,000.00 received by you as compensation for services as trustee of the Boston Elevated Railway Company has been added to income.

The Bureau holds that salary received by the trustees of the Boston Elevated Railway Company was not derived from the exercise of an essential, governmental function as provided by article 643 of Regulations 74, and hence such income should be included for taxation.

Payment should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Exhibit B

CHAPTER 159, SPECIAL ACTS, 1918

[Memorandum. Omitted by direction of counsel. A. I. Charron, clerk.]

69 Before United States Board of Tax Appeals

Docket No. 50575

[Title omitted.]

Answer

Filed December 22, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for answer to the petition filed by above-named taxpayer, admits and denies as follows:

1. Admits the averments contained in paragraph 1.
2. Admits the averments contained in paragraph 2.
3. Admits the averments contained in paragraph 3.
4. Denies error in the action complained of in paragraph 4.
5. Admits the averments contained in paragraph 5, with the exception that the petitioner was an officer of the Commonwealth of Massachusetts, which averment is denied.
6. Denies the averments contained in paragraph 6.

Wherefore, it is prayed that the taxpayer's petition be denied.

C. M. CHAREST,

[SEAL] *General Counsel, Bureau of Internal Revenue.*

Of counsel:

HAROLD ALLEN,

Special Attorney, Bureau of Internal Revenue.

Findings of Fact and Opinion

[Memorandum. Already printed at pages 23 to 40, inclusive. Findings of Fact and Opinion are here omitted. A. I. Charron, clerk.]

70 Before United States Board of Tax Appeals, Washington

Docket No. 48007

STANLEY R. MILLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Entered October 27, 1932

Pursuant to the determination of the Board, as set forth in its report promulgated October 27, 1932, it is

Ordered and decided: That there are deficiencies of $240.89 and $334.36 for the years 1926 and 1927, respectively.

CHARLES P. SMITH, MEMBER

Before United States Board of Tax Appeals, Washington

Docket No. 50575

STANLEY R. MILLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Entered October 27, 1932

Pursuant to the detremination of the Board, as set forth in its report promulgated October 27, 1932, it is

Ordered and decided: That there is a deficiency of $226.92 for the year 1928.

CHARLES P. SMITH, *Member.*

Before United States Board of Tax Appeals

Docket No. 48007

[Title omitted.]

Petition for Review

Filed December 22, 1932

The above-named petitioner, Stanley R. Miller, hereby petitions for review of a decision of the United States Board of Tax
71 Appeals rendered upon his appeal numbered in the docket of said Board as above and in support of this his said petition avers as follows:

I. The petitioner is an individual residing at 94 Centre Street, Milton, in the county of Norfolk and Commonwealth of Massachusetts (formerly residing at 280 Dudley Street, Brookline).

II. The controversy relates to the Federal income taxes of the petitioner for the calendar years 1926 and 1927. The petitioner claims that the salary in the years 1926 and 1927 as one of the public trustees of the Boston Elevated Railway Company is not subject to the Federal income tax. The Commissioner of Internal Revenue has disallowed this claim, has included said salary in the petitioners' taxable income, and in consequence has asserted, and the said Board of Tax Appeals has now by its decision entered October 27, 1932, affirmed, a deficiency for the said years in the sum of $575.25, which decision and deficiency your petitioner asserts to be erroneous.

(Memorandum. The remaining paragraphs III to IV (9) being the same as those in no. 47836 except that the word "petitioner" is substituted for the words "petitioner's decedent", printed at pages 42 and 43, are here omitted. A. I. Charron, clerk.)

Wherefore, the petitioner prays that the said decision may be reviewed by the said United States Circuit Court of Appeals for the First Circuit and be reversed and the said deficiency disallowed.

STANLEY R. MILLER.

[*Duly sworn to by Stanley R. Miller; jurat omitted in printing.*]

72 Before United States Board of Tax Appeals

Docket No. 48007

[Title omitted.]

Affidavit of service of petition for review

Filed January 20, 1933

Stanley R. Miller, of lawful age, having been first duly sworn, upon his oath states:

That he served the petition for review in the above-entitled case and notice of filing the same on the Commissioner of Internal Revenue by sending a copy of said petition with a letter of notification of which the attached is a correct copy by registered United States mail to C. M. Charest, Esq., general counsel, Bureau of Internal Revenue, at Washington, D.C.; that said copy and letter were enclosed in an envelope bearing the return address of Stanley R. Miller, 31 Milk Street, Boston, Massachusetts, and properly addressed to said C. M. Charest, Esq., as aforesaid; that said copy and letter so registered were deposited in the United States mail on January 9, 1933.

STANLEY R. MILLER.

BOSTON, *January 9, 1933.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Subscribed and sworn to before me.

[SEAL] RANSOM C. PINGREE,
Notary Public.

Before United States Board of Tax Appeals

Docket No. 50575

[Title omitted.]

Petition for review

Filed December 22, 1932.

(Memorandum. This petition for review being the same as the petition for review in no. 48007, except that taxes here involved are for the calendar year 1928 instead of the years 1926 and 1927, printed at pages 70 and 71, is here omitted. A. I. Charron, clerk.)

73 Before United States Board of Tax Appeals

Docket no. 50575

[Title omitted.]

Affidavit of service of petition for review

Filed January 20, 1933

[Memorandum. Being identical with the affidavit of service in no. 48007, printed at page 72, this affidavit of service is here omitted. A. I. Charron, clerk.]

Before United States Board of Tax Appeals

Docket no. 48007

[Title omitted.]

Statement of the evidence

Filed January 20, 1933

The above-entitled appeal was consolidated for hearing and decision with four other pending cases (Leland Powers, executor, no. 47836; Henry I. Harriman, no. 61846; Stanley R. Miller, no. 50575; Winthrop Coffin, no. 51029). The evidence consisted of stipulations of facts severally entered into by each petitioner and the respondent. The stipulation which constituted the entire evidence upon the above-entitled appeal was as follows:

It is hereby stipulated and agreed by and between the parties hereto as follows:

The petitioner is an individual residing at Brookline, Mass. The notice of deficiency (a copy of which is attached to the petition in this case, marked "Exhibit A") was mailed to the petitioner on February 13, 1930. This petition, Docket No. 48007, was filed with the Board of Tax Appeals, March 28, 1930. The taxes in controversy are income taxes for the years 1926 and 1927, the entire amount of said alleged deficiency being five hundred seventy-five dollars and twenty-five cents ($575.25) as set forth in said exhibit A.

On June 26, 1918, the petitioner was appointed by the Governor of the Commonwealth of Massachusetts, with the advice and consent of the executive council, a member of board of trustees of
74 the Boston Elevated Railway Company, pursuant to the provisions of chapter 159 of the Special Acts of said Commonwealth for 1918, for a term of office expiring July 1, 1928, and the petitioner, owning no stock or other securities of the Boston Elevated Railway Company or of any company owned, leased, or operated by it, thereupon qualified for said office by taking the oaths required by the constitution and the laws of the Commonwealth of Massachusetts to be taken by public officials before entering upon the discharge of their duties.

In 1926 and 1927 the petitioner, as a trustee of the Boston Elevated Railway Company, was an officer of the Commonwealth of Massachusetts, and by virtue of holding said office received as compensation therefor in each year the sum of five thousand dollars ($5,000) as provided in said chapter 159 of the Special Acts of 1918.

The Commissioner has held that this salary amounting to five thousand dollars ($5,000) received by the petitioner as a member of the board of trustees of the Boston Elevated Railway for and during each of the years 1926 and 1927 is subject to an income tax imposed by the Revenue Act of 1926. The deficiency in tax

involved in each year arises wholly from the inclusion by the Commissioner of the petitioner's salary as trustee of the Boston Elevated Railway Company for the years in question.

Chapter 159 of the Special Acts of 1918 became duly operative by the performance of all conditions upon the happening of which the act was to take effect and was in operation during the years of 1926 and 1927. The petitioner, as a member of the board of trustees of said Boston Elevated Railway Company, created by and under said chapter 159, was engaged during said years 1926 and 1927 in exercising and performing the several powers and duties bestowed upon said board of trustees by said chapter 159.

Said act transferred to the board of trustees powers of management and operation previously vested in the board of directors of the private corporation. The powers thus transferred include the right to make contracts in the name of the corporation; to receive and pay out all income or other moneys to which it is
75 entitled; to issue stock, bonds, or promissory notes of the company; and to appoint and remove all officers of the company other than the board of directors.

Under said act the trustees are also given the right to regulate and fix fares, including the issue, granting, and withdrawal of transfers, and the imposition of charges therefor, and to determine the character and extent of the service and facilities to be furnished and "in these respects their authority shall be exclusive and shall not be subject to the approval, control, or direction of any other State board or commission." Powers were thus given the board of trustees which had been previously vested in and exercised by the public service commission of the Commonwealth of Massachusetts.

The Board of Tax Appeals, or any tribunal dealing with the petition in the above-entitled case, may take judicial notice of, and there are incorporated herein by reference, said chapter 159 of the Special Acts of Massachusetts for 1918 and the statements of fact so far as pertinent in the various decisions and opinions of the United States Supreme Court, of the Supreme Judicial Court of Massachusetts, and of the Board of Tax Appeals, wherein said act is discussed, and any other public laws of the United States or the Commonwealth of Massachusetts pertinent hereto; and also any additional matter contained in the taxpayer's petition and admitted by the respondent's answer filed herein.

STANLEY R. MILLER,
Petitioner.

C. M. CHAREST,
Attorney for Respondent.

Agreed to January 19, 1933.

C. M. CHAREST,
Attorney for Respondent.

Approved and ordered filed this twentieth day of January 1933.

CHARLES P. SMITH, *Member.*

76 Before United States Board of Tax Appeals

Docket No. 50575

STANLEY R. MILLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement of the evidence

Filed January 20, 1933

The above-entitled appeal was consolidated for hearing and decision with four other pending cases (Leland Powers, executor, no. 47836; Henry I. Harriman, no. 61846; Stanley R. Miller, no. 48007; Winthrop Coffin, no. 51029). The evidence consisted of stipulations of facts severally entered into by each petitioner and the respondent. The stipulation which constituted the entire evidence upon the above-entitled appeal was as follows:

It is hereby stipulated and agreed by and between the parties hereto as follows:

The petitioner is an individual residing at Brookline, Mass. The notice of deficiency (a copy of which is attached to the petition in this case, marked "Exhibit A") was mailed to the petitioner on September 26, 1930. This petition, Docket No. 50575, was filed with the Board of Tax Appeals November 1, 1930. The taxes in controversy are income taxes for the year 1928, said alleged deficiency being two hundred twenty-six dollars and ninety-two cents ($226.92) as set forth in said exhibit A.

On June 26, 1918, the petitioner was appointed by the Governor of the Commonwealth of Massachusetts, with the advise and consent of the executive council, a member of board of trustees of the Boston Elevated Railway Company, pursuant to the provisions of chapter 159 of the Special Acts of said Commonwealth for 1918, for a term of office expiring July 1, 1928, or thereafter on the qualification of a successor, and the petitioner, owning no stock or other securities of the Boston Elevated Railway Company or of any company owned, leased, or operated by it, thereupon qualified for said office by taking the oaths required by the constitution and the laws of
77 the Commonwealth of Massachusetts to be taken by public officials before entering upon the discharge of their duties. On December 26, 1928, the petitioner was reappointed by the Governor of the Commonwealth of Massachusetts, with the advise and consent of the executive council, a member of the board of trustees of said railway company, under the provisions of said chapter 159, for a further term of ten years from July 1, 1928, and he thereupon qualified for said office on December 27, 1928, by taking the oaths required by the constitution and the laws of the Commonwealth of Massachusetts to be taken by public officials before entering upon the discharge of their duties.

Throughout 1928 the petitioner, as a trustee of the Boston Elevated Railway Company, was an officer of the Commonwealth of Massachusetts, and by virtue of holding said office received as compensation therefor in said year the sum of five thousand dollars ($5,000) as provided in said chapter 159 of the Special Acts of 1918.

The Commissioner has held that this salary amounting to five thousand dollars ($5,000) received by the petitioner as a member of the board of trustees of the Boston Elevated Railway for and during 1928 is subject to an income tax imposed by the Revenue Act of 1926, and amendments thereto. The deficiency in tax involved arises wholly from the inclusion by the Commissioner of the petitioner's salary as trustee of the Boston Elevated Railway Company for the year in question.

[Memorandum. The remaining paragraphs of this statement of evidence being the same as those in no. 48007, except that the year 1928 is here substituted for the years 1926 and 1927, printed at pages 72 to 75, inclusive, are here omitted. A. I. Charron, clerk.]

STANLEY R. MILLER,
Petitioner.

C. M. CHAREST,
Attorney for Respondent.

Agreed to January 19, 1933.

C. M. CHAREST,
Attorney for Respondent.

Approved and ordered filed this twentieth day of January 1933.

CHARLES P. SMITH, *Member.*

78 Before United States Board of Tax Appeals

Docket No. 48007

[Title omitted.]

Docket No. 50575

Praecipe for record

Filed January 19, 1933

[Memorandum. This praecipe, being the same as that already printed at pages 50 and 51, is here omitted. A. I. Charron, clerk.]

STANLEY R. MILLER,
Petitioner, 31 Milk Street, Boston, Massachusetts.

JANUARY 7, 1933.

Service of a copy of the foregoing is hereby acknowledged this nineteenth day of January 1933.

C. M. CHAREST,
Attorney for Respondent.

[Clerk's certificate to foregoing transcript omitted in printing.]

79 [Memorandum. Orders of enlargement of time for docketing these petitions for review to and including April 15, 1933, are here omitted. A. I. Charron, clerk.]

81 In United States Circuit Court of Appeals, First Circuit

Minute entries

On August 1, 1933, motions for substitution of Guy T. Helvering, Commissioner of Internal Revenue, for David Burnet in each of five petitions for review, consolidated in this court by leave of court, were filed and allowed.

Thereafter, to wit, on October 5 and 6, 1933, this consolidated case came on to be heard by the court, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, and Honorable Clarence Hale, District Judge, sitting.

83 In United States Circuit Court of Appeals for the First Circuit

No. 2811. October term, 1933

LELAND POWERS, EXECUTOR, ET AL., PETITIONERS FOR REVIEW

v.

COMMISSIONER OF INTERNAL REVENUE

Appeal from the Board of Tax Appeals

Before WILSON, MORTON, and HALE, JJ.

Opinion of the court

Filed January 9, 1934

MORTON, J.: The question is whether the public trustees of the Boston Elevated Railway Co. were subject to a Federal income tax on their official salaries for the years 1926–9. The Commissioner held that they were, and the Board of Tax Appeals affirmed his ruling. The facts are stated in the findings and opinion of the Board. (26 B.T.A. 1381.) There are differences between the cases of different petitioners as to the tax year, or years, which are involved; but these differences do not affect the legal questions before us.

The unusual arrangement under which the Commonwealth of Massachusetts took over the Boston Elevated Railway Co. has been the subject of much judicial consideration. (See Opinion of the Justices, 231 Mass. 603; Boston v. Treasurer, 237 Mass. 403; Opinion

of the Justices, 261 Mass. 523; Boston v. Jackson, 260 U.S. 309.)

It was, in substance, that the Railway Company turned over
84 its property to the Commonwealth for a term of years in return for guaranteed dividends on its stock and interest on its obligations; the railway continued to be operated under the company's charter, but by public officials, instead of by corporate officers. Under the statute (Acts of 1918, chap. 159), the Governor appointed, with the advice and consent of the executive council, five persons called "trustees" to act as managers of the railway. Their term of office was ten years; they were sworn to the faithful discharge of their duties; they were removable by the Governor and council; they were each paid $5,000 per year as salary; they had final power to fix rates, exercising as to this company powers otherwise vested in the public service commission; and they had authority, under certain circumstances, to declare deficits, which they apportioned among the communities served, and which were then included in the tax levy. The petitioners and their co-trustees were duly appointed and operated the railway during the years here in question, viz: 1926, 1927, 1928, and 1929.

The statutes involved are the Revenue Acts of 1926 and 1928 (44 Stat. 9; 45 Stat. 791); and the Treasury Regulations made under them. (Regulations 69, art. 88, act of 1926; Regulations 74, art. 643, act of 1928.) The controversy really arises out of the Treasury Regulations under the act of 1926, which was, in substance, repeated under the later act. It is as follows:

"ART. 88. Compensation of State officers and employees. Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States and the commissions of receivers appointed by State courts, is not taxable. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (a) the person received such compensation as an officer or employee of a State or political subdivision, and (b) the services are rendered in connection with the exercise of an essential governmental function."

Two basic questions are presented, (1) Were the petitioners entitled to exemption under the regulation? (2) If not, is the
85 regulation, insofar as it denies them exemption, valid under established law? As to (1), the regulation exempts from the Federal income tax salaries of State officers or employees, if paid "for services rendered in connection with the exercise of an essential governmental function of the State." It is clear that the petitioners are public officers of the State. They hold offices created by a statute; they are appointed by the Governor with the advice and consent of the council; they may be removed by him with the consent of

the council; they are sworn to the faithful discharge of their duties; they exercise on behalf of the Commonwealth final power over rates of fare, being pro tanto a public service commission; they have power to declare and apportion deficits which are thereupon collected by taxation. The position which they hold has practically all the important characteristics of public office. Metcalf & Eddy v. Mitchell, Adm'x, 269 U.S. 514; Commissioner v. Ogden, 62 Fed. (2d) 334 (C.C.A. 1). While the statute says that for certain purposes they "shall not be considered public officers", it seems to us that for present purposes they are so. They have been so referred to by the Supreme Judicial Court (231 Mass. 603), and they have been held to be such by the Board of Tax Appeals in the case of Winthrop Coffin (12 B.T.A. 702), a decision which we do not understand has been overruled on that point by that in the case before us.

The Board of Tax Appeals, agreeing that the petitioners were "public officials as that term has been liberally interpreted", held that, "as they were not exercising governmental functions in the performance of their duties", they did not bring themselves within the exemption permitted by the regulation; that the regulation was valid according to its terms; and that the salaries were, therefore, taxable. It may be conceded that, judging by classical standards, the operation of a street railway is not an essential function of government (Flint v. Stone Tracy Co., 220 U.S. 107; So. Carolina v. United States, 199 U.S. 437),—although how long such standards of governmental function will be valid, in view of the present tendency to extend the field of governmental activities, is perhaps uncertain. But these trustees have much
86 greater power than merely to operate a street railway. They have the power, as has been pointed out, to fix rates, and to declare deficits which upon their decision were collected by taxation. Both these powers are by any standard essentially governmental. If a State officer exercises any powers of that character, his entire salary is, in our opinion, exempt by the regulation. We do not think it is the intention of the regulation that there should be an apportionment of exemption, that a certain part of the salary should be, more or less arbitrarily, allocated to the service of governmental character and exempted, while the rest of the salary is taxed —and no such contention is made. The salaries in question were therefore exempt under the regulations.

As to (2): On broader grounds also we are of the opinion that these salaries were not taxable. It has long been established that, in our curious, dual government, neither sovereign could tax the pay of officers of the other. Dobbins v. Commissioner 16 Peters 435; Buffington v. Day, 11 Wall. 113; Metcalf & Eddy v. Mitchell, Adm'x., 269 U.S. 514. In the case last cited, it was said, "It is on this principle that, as we have seen, any taxation by one government *of the salary of an officer of the other* . . . is prohibited." (Italics

supplied.) Stone, J., page 524. We are aware of no decision which holds that one sovereign may tax the salary of a *public officer* of the other, nor of any precedent for such discrimination in exemption as is set up by the regulation. No such ground of discrimination was suggested in the Metcalf & Eddy case, supra, although it was open on the facts, the plaintiff being a water-works engineer employed under contract by a public body. In Massachusetts, ownership and operation of water works by the public is not regarded as a governmental function. Lynch v. Springfield, 174 Mass. 430. In the Metcalf & Eddy case the government waived its appeal from the ruling of the District Court, that the salaries which the plaintiffs received as chief engineer of the Kennebec Water District, a political subdivision of Maine, and as a member of the North Shore Sanitary District, a political subdivision of Illinois, were exempt from Federal taxation, and in effect assented that such exemption was correct. The decisions relied upon by
87 the Government do not touch the question under discussion. They deal with the taxability of different kinds of commerce and industry—something quite different from the taxability of the salaries of State officers.

As a practical matter, the test adopted in the Treasury regulation opens a wide door for controversy, especially in view of the extension of government into new fields. Is it open to States to tax the salaries of all Federal officers except those employed on classical governmental functions? And vice versa? We do not think so.

That the salaries of the trustees were paid in the first instance by ahe railway company is not important. Fees of deputy sheriffs, of public administrators, of deputy marshals, of notaries public, and of many other officials of the Federal or State Governments, are not paid from the Public Treasury, but are nevertheless recognized as exempt from taxation by the other government. Moreover, during and at the close of the period under discussion, the railway company was heavily indebted to the Commonwealth for operating deficits which had been collected out of taxation. The salaries increased the deficits, and may well be regarded as having been paid by the public.

The decision of the Board of Tax Appeals is reversed and the case is remanded to that Board for further proceedings not inconsistent with this opinion.

In United States Circuit Court of Appeals

Final decree

January 9, 1934

This cause came on to be heard October 5 and 6, 1933, upon the record upon petition for review of the United States Board of Tax Appeals, and was argued by counsel.

Upon consideration whereof, it is now, to wit, January 9, 1934, here ordered, adjudged, and decreed as follows: The decision of the Board of Tax Appeals is reversed and the case is remanded
88 to that Board for further proceedings not inconsistent with the opinion passed down this day.

By the court.

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on February 9, 1934, mandate issued to the United States Board of Tax Appeals.

[Clerk's certificate to foregoing transcript omitted in printing.]

89 Supreme Court of the United States

Order allowing certiorari

Filed May 14, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File no 38549. U. S. Circuit Court of Appeals, First Circuit. Term no. 17. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Leland Powers, Executor, et al. Petition for a writ of certiorari and exhibit thereto. Filed April 9, 1934. File no. 17. O.T. 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934